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No. 04-479

Supreme Court, U.S.
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In The
Supreme Court of the United States

DONALD E. ARMSTRONG, POST-BANKRUPTCY PETITION AND AS A BENEFICIARY OF THE DONALD E. ARMSTRONG FAMILY TRUST AND THE DONALD E. ARMSTRONG CHARITABLE REMAINDER UNITRUST,

Petitioner,

v.

ROGER G. SEGAL, AS TRUSTEE OF BANKRUPTCY ESTATE OF MOUNTAIN PACIFIC VENTURES, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Is Armstrong's appeal of the Order confirming the Plan of Reorganization in the bankruptcy case of Mountain Pacific Ventures, Inc. ("MPV") moot as a result of the substantial consummation of the Plan, which paid all unsecured creditors, including Armstrong, in full?

(2) Is review of the "litigation injunction" included in the Plan of Reorganization confirmed in MPV's bankruptcy case legally merited where the injunction is at the core of the Plan of Reorganization and reasonably calculated to protect the bankruptcy process?

(3) May Armstrong use appeal from the Order confirming a Plan of Reorganization in the Mountain Pacific Ventures, Inc. bankruptcy case to challenge a final judgment rendered by the Texas state court, *Armstrong v. Steppes Apartments Ltd*, 57 S.W.2d 37 (Tex. App. – July 6, 2001), *rev. denied*, (3 pets) (January 10, 2002), *cert. denied*, 536 U.S. 95, 122 S.Ct. 2645, 153 L.Ed.2d 823 (2002) (the "Texas Modified Judgment").

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STATEMENT OF THE CASE

The Petition for Writ of Certiorari before this Court arises from the Chapter 11 bankruptcy case of Mountain Pacific Ventures, Inc. ("MPV") filed, through Donald E. Armstrong, ("Armstrong"), then MPV's president, in the United States Bankruptcy Court for the District of Utah, case number 99C-22588 (the "MPV Bankruptcy"). Armstrong, however notes, that the matters involved in that bankruptcy stem from litigation between Armstrong and Steppes Apartments Ltd. ("Steppes") in Texas State Court, which resulted in the Texas Modified Judgment, awarding damages against Armstrong in excess of $2 million. (*See Petition for a Writ of Certiorari*, hereinafter cited as "Armstrong's Petition," at p. 18). In fact, the MPV Bankruptcy was filed by Armstrong in part, in order to stay post-judgment litigation against Armstrong and MPV in which Steppes asserted, *inter alia* that Armstrong fraudulently conveyed assets to avoid payment of that judgment. As a result of pre- and post-petition misconduct by Armstrong, Respondent, Roger G. Segal (the "Respondent") was appointed Trustee of the bankruptcy estate of MPV. Steppes filed a proof of claim against MPV's bankruptcy case for assets transferred from Armstrong, including, specifically, an interest in a partnership with a value exceeding $400,000.00. Armstrong, likewise, filed two proofs of claim, totaling $414,615.26 for amounts allegedly loaned by Armstrong to MPV.

The Respondent, acting as Trustee of the MPV bankruptcy estate vigorously pursued claims against Steppes, including, *inter alia* the claim that Steppes had filed a wrongful lien against MPV property. In the meantime, post-judgment litigation between Armstrong and Steppes

continued and, just prior to entry of judgment against Armstrong in that litigation, Armstrong filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Utah, commencing bankruptcy number 00-26592 (the "Armstrong Bankruptcy"). Kenneth A. Rushton ("Rushton") was thereafter appointed Trustee of the Armstrong Bankruptcy. As a matter of law, all property of Armstrong, including claims against MPV, Steppes, all of the stock of MPV (which had been owned, pre-petition, by Armstrong) and the revocable "Trusts" created by Armstrong, became property of Armstrong's bankruptcy estate controlled, not by Armstrong, but by Rushton. After the filing of his own bankruptcy petition, Armstrong acquired (presumably by purchase) claims of other creditors of the MPV estate. Those claims are the only "interest" that he had in MPV's bankruptcy after the filing of his own petition in bankruptcy.

Negotiations commenced between Respondent, Rushton and Steppes to resolve ongoing litigation. Armstrong correctly notes that, during that time, Respondent continued in litigation with Steppes, leading to partial summary judgment by the Bankruptcy Court finding that Steppes had, in fact, filed a wrongful lien against MPV property. However, the question remained – and a venerable question indeed – how much "damage" that lien caused MPV. Indeed, the Bankruptcy Court remarked that, though wrongful, the liens actually *benefitted* MPV by preventing fraudulent conveyance of assets from that estate. *See*

Transcript of Hearing dated May 24, 2001, attached hereto as Appendix 1 at pp. 3a-4a.[1]

Prior to the Bankruptcy Court's ruling on the wrongful lien motion for summary judgment, Segal, Steppes and Rushton entered into negotiations, which culminated in the signing of a Stipulation for Settlement between Steppes, Rushton and Respondent, executed on September 7, 2001 which attached as Appendix "I" to Armstrong's Petition (the "Plan Settlement"). Under the Plan Settlement, both Steppes and Rushton agreed to withdraw all of their claims against the bankruptcy estate of MPV. Rushton, as sole shareholder of MPV, was then to receive the assets remaining in MPV after payment of all unsecured claims. Steppes received no distribution from MPV's bankruptcy estate under the Plan Settlement. Steppes agreed to limit its claim against Armstrong's bankruptcy in a manner which, absent extraordinary litigation expense (which has, in fact ensued in that case) would have left sufficient assets in the estate of Armstrong to pay unsecured creditors, in full, and return substantial assets to Armstrong.

As part of the Plan Settlement, Steppes required some assurance that it would not have to continue to litigate endlessly with Armstrong about the claims, which were property of the bankruptcy estates of MPV and Armstrong, and which were settled by virtue of the Plan Settlement. Accordingly, the Plan Settlement provides:

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[1] Armstrong's Petition includes part of this Transcript as Appendix "G," but omits parts that do not support his perceptions of the claims against Steppes.

I. D. *Injunction Against Future Litigation.*

The Plan of Reorganization confirmed in the Armstrong Case shall also include a permanent injunction enjoining Armstrong from commencing or continuing any litigation against the Steppes parties . . . Segal, Rushton or any of those parties' principals, professionals, agents and assigns, based upon claims or causes of action released pursuant to the terms of this Settlement Agreement or a Plan of Reorganization which includes the terms of this Settlement Agreement. The Plan of Reorganization shall also contain a permanent injunction barring Armstrong from commencing or continuing causes of action based upon any action taken by Rushton, Segal, the Steppes Parties, or any of their principals, agents, attorneys, and related parties, in effectuating the settlement and the plan. The injunction shall apply to Donald Armstrong, individually, [the Trusts related to Donald E. Armstrong] as well as any entity related to Donald Armstrong and controlled by him in whole or in part or any entity over which Donald Armstrong asserts actual control (the "Armstrong Entities").

To assure compliance with the injunction, Rushton shall seek a provision in any injunction to be approved as part of a plan of reorganization that Donald Armstrong must apply to the bankruptcy court for authority to commence or continue litigation against the Steppes Parties, Segal, Rushton or any of those parties' principals, professionals, attorneys, agents and assigns. If approved by the bankruptcy court, the injunction shall provide that if Donald Armstrong desires to file or pursue

any claim or litigation against the Steppes Parties, Segal, Rushton or any of those parties' principals, professionals, attorneys, agents and assigns, Donald Armstrong must first file an application with the bankruptcy court, showing that the desired litigation does not violate the terms of the Plan of Reorganization confirmed in the Armstrong Case, including the release and injunction contained in that Plan. After providing notice and a reasonable opportunity for response by the Steppes Parties, Segal, Rushton (and/or any of those parties' principals, professionals, attorneys, agents and assigns), the bankruptcy court will make a determination whether Donald Armstrong shall be permitted to pursue such claim or litigation. The bankruptcy court will grant authority to Donald Armstrong to commence a suit against a released party only upon a finding that such litigation does not violate the terms of the Plan of Reorganization confirmed in the Armstrong Case, including the release and injunction contained in that Plan. In the event Donald Armstrong files an application with the bankruptcy court under this section, and such application is denied by the Court, then the Steppes Parties, Segal, Rushton (and/or any of those parties' principals, professionals, attorneys, agents and assigns) shall be awarded reimbursement of all attorney's fees and costs reasonably incurred in relation to the application – including fees incurred in responding to the application and in attending any hearing on the matter. Such reimbursement shall be obtained by application to the bankruptcy court, and shall be paid from the assets of the Armstrong Estate and/or the Reorganization Trust described in Section I.E., *infra*. Such reimbursement shall reduce the

amount of funds available for disbursement under the Reorganization Trust (as defined below).

In the event the Armstrong Entities violate the permanent injunction set forth in the Plan of Reorganization confirmed in the Armstrong Case, by commencing or continuing litigation against the Steppes Parties, Segal, Rushton or any of those parties principals, professionals, attorneys, agents and assigns without bankruptcy court authority, or otherwise, and in the event that Rushton receives reliable information to conclude that a suit has been commenced against one of the released parties without Bankruptcy Court authority, Rushton shall take reasonable actions to seek enforcement of the permanent injunction in the bankruptcy court. The reasonable cost of such enforcement, including fees incurred by professionals, shall be considered a cost of administration of the Plan of Reorganization payable from funds remaining in the estate and/or the "Reorganization Trust" upon application to the bankruptcy court, as set forth in Section I.G., *infra*. . . .

II. C. *Injunction Against Future Litigation.*

The Plan of Reorganization confirmed in the MPV Case shall also include a permanent injunction enjoining Armstrong from commencing or continuing any litigation against the Steppes Parties, Segal, Rushton or any of those parties' principals, professionals, agents and assigns, (including but not limited to those persons listed in paragraph I.C. of this Stipulation) based upon claims or causes of action released pursuant to the terms of this Settlement Agreement or a Plan of Reorganization which includes the terms of this Settlement Agreement. The Plan of Reorganization shall also contain a permanent

injunction barring Armstrong from commencing or continuing causes of action or based upon any action taken by Rushton, Segal, the Steppes Parties, or any of their principals, agents, attorneys, and related parties, in effectuating the settlement and the plan. To assure compliance with the injunction, Segal shall seek a provision in any injunction to be approved as part of a plan of reorganization that Armstrong must apply to the bankruptcy court for authority to commence or continue litigation against the Steppes Parties, Segal, Rushton or any of those parties' principals, professionals, agents and assigns (including but not limited to those persons listed in paragraph I.C. of this Stipulation). If approved by the bankruptcy court, the injunction shall provide that the bankruptcy court will grant authority to Armstrong to commence a suit against a released party only upon a finding that such litigation does not violate the terms of the Plan of Reorganization confirmed in the MPV Case, including the injunction contained in that Plan.

In the event Armstrong violates the permanent injunction set forth in the Plan of Reorganization confirmed in the MPV Case by commencing or continuing litigation against Steppes, Segal, Rushton or any of those parties, principals, professionals, agents and assigns (including but not limited to those persons listed in paragraph I.C. of this Stipulation) without bankruptcy court authority, and Segal receives reliable information to conclude that a violation of the permanent injunction may have occurred, Segal shall take reasonable actions to seek enforcement of the permanent injunction in the bankruptcy court and the cost of such enforcement, including necessary fees incurred by professionals, shall be

> considered a cost of administration of the Plan of Reorganization payable from funds remaining in the estate upon application to, and allowance by, the bankruptcy court and/or allowable for payment from the Armstrong Estate under paragraph I.G. of this Settlement Agreement.

The Plan Settlement was incorporated into a Plan of Reorganization (the "Armstrong Plan") in the Armstrong bankruptcy and that Plan was confirmed, after contested hearing, on January 31, 2002. A copy of the Order confirming the Armstrong Plan (the "Armstrong Confirmation Order") is attached hereto as Appendix 2. The Order was not timely appealed. *Armstrong v. Rushton*, 294 B.R. 344, 355 (BAP 10th Cir. 2003).[2] Accordingly, under the Armstrong Confirmation Order:

> Donald E. Armstrong, the Donald E. Armstrong Family Trust, the Donald E. Armstrong Charitable Remainder Unitrust, and any other entity related to the Debtor and controlled by him in whole or in part, . . . are . . . enjoined from commencing or continuing any litigation against Steppes Apartments Ltd., Rushton, Segal, and

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[2] The Bankruptcy Appellate Panel's decision in *Armstrong v. Rushton* is instructive on virtually all of the legal arguments raised in Armstrong's Petition. Indeed, similar arguments have been raised by Armstrong in numerous cases, in several different courts and jurisdictions. *See In re Armstrong*, 297 B.R. 154, 159 (Bankr. D. Utah 2003), *aff'd*, 309 B.R. 799 (BAP 10th Cir. 2004)(outlining litigation that has been pursued by Armstrong). Thus, Armstrong's position that he has been denied access to any court is simply not accurate. An accurate statement is that Armstrong's arguments have not prevailed in the courts. While that is, perhaps, frustrating to Armstrong, the failure of the courts to agree with a litigant's position is not a constitutional denial of access to the courts.

any of those parties' principals, professionals, agents, and assigns based upon (1) claims or causes of action released pursuant to the terms of this Plan and the Steppes/Rushton/Segal Settlement and (2) claims or causes of action based upon action taken by Rushton, Segal, Steppes and any of those parties' principals, professionals, agents, and assigns in effectuating the Steppes/Rushton/Segal Settlement and this Plan. Armstrong must apply to the Court for authority to commence or continue litigation against any of these parties or their principals, professionals, agents, or assigns and the Court will grant such authority only upon a finding that such litigation does not violate the terms of this Plan, including the Litigation Injunction.

In the event Armstrong violates the permanent injunction set forth in the Plan of Reorganization confirmed in the MPV Case by commencing or continuing litigation against Steppes, Segal, Rushton or any of those parties principals, professionals, agents and assigns without bankruptcy court authority, and Segal receives reliable information to conclude that a violation of the permanent injunction may have occurred, Segal shall take reasonable actions to seek enforcement of the permanent injunction in the bankruptcy court and the cost of such enforcement, including necessary fees incurred by professionals, shall be considered a cost of administration of the Plan of Reorganization payable from funds remaining in the estate upon application to, and allowance by, the bankruptcy court and/or allowable for payment from the Armstrong Estate under paragraph I.G. of the Steppes/Rushton/Segal Settlement.

(Hereinafter referred to as the "Armstrong Litigation Injunction"). *See Armstrong Confirmation Order* attached hereto as Appendix 2 at pp. 32a-33a.

The Armstrong Confirmation Order also provides, *inter alia,* that the assets and operative control of the Family Trust and the Donald E. Armstrong Charitable Unitrust (the "Trusts") were property of the Armstrong bankruptcy estate – and are to be turned over to Rushton (and provides that Rushton will dissolve the Family Trust). *See Armstrong Confirmation Order* attached hereto as Appendix 2 at pp. 27a-30a.

The Plan Settlement was incorporated into a Plan of Reorganization filed in MPV's case, (the "MPV Plan"). The MPV Plan, a Disclosure Statement, a Notice of Hearing and, where appropriate, ballots, were circulated to all parties in interest. Armstrong cast ballots for each of the claims that he acquired. The class of general unsecured creditors under the MPV Plan was unimpaired. They were to be, and have been, paid in full, with interest. Therefore, the vote of the unsecured class was irrelevant to MPV Plan confirmation. Nonetheless, for informational purposes, the votes cast by unsecured creditors were provided to the bankruptcy court. The *only* unsecured votes cast against the MPV Plan were those cast by Armstrong for the claims that he purchased. All other unsecured creditors voted for the Plan. Therefore, even with Armstrong's votes against the MPV Plan, the votes cast included more than half in number and two-thirds in amount of votes cast. *See MPV Confirmation Order* attached as Appendix C to Armstrong's Petition at appendix p.11(a).

In accord with the Plan Settlement, Steppes was treated under the MPV Plan as if it had no claim against

the estate of MPV and its claim was unimpaired. *Steppes received no distribution under the MPV Plan and waived its claim against the estate of MPV as part of the Plan Settlement.* The only impaired claims under the MPV Plan were the claims filed against the bankruptcy estate by Armstrong, which had vested in Rushton as Trustee of the Armstrong bankruptcy. Rushton agreed to waive those claims and accept distribution as a shareholder. Rushton voted for confirmation of the Plan.

As for the 1993 Suzuki, in the Statements and Schedules filed in MPV's case and signed by Armstrong, Transwest Credit Union ("Transwest") was listed as an oversecured creditor, with a claim of $7,315.90 secured by a 1993 Suzuki (the "Suzuki"), owned by MPV with a value of $8,000.00. No unsecured claim (indeed, no proof of claim at all) was filed by Transwest prior to confirmation. The Suzuki remained in Armstrong's possession for Armstrong's use. MPV did not use or have possession of the Suzuki, and Armstrong never paid MPV for the use of the Suzuki. Armstrong, not MPV, was the obligor on the loan to Transwest. *See Order*, attached hereto as Appendix "3" at p. 31a. The MPV Plan as proposed at the time of the confirmation hearing provided that the Suzuki would be abandoned by the estate in satisfaction of Transwest's claim. The Court held that Transwest's claim was unimpaired if the Plan was modified to provide that: (a) the Suzuki was to be retained by Armstrong in satisfaction of the claim or sold within 60 days of the confirmation, leaving Armstrong to file a proof of claim for any deficiency; (b) the Trustee had the ability to object to allowance of that proof of claim, but likewise, was obligated to pay the claim, if allowed. The Order confirming the MPV Plan (the "MPV Confirmation Order") provided for that

treatment of the Transwest claim. *See MPV Confirmation Order* attached as Appendix "C" to Armstrong's Petition at pp. 9(a) and 12(a). Armstrong did not surrender the Suzuki, but he has continued to request that the Bankruptcy Court allow him to keep the car *and* get paid as an unsecured creditor in MPV's Bankruptcy, which request the Bankruptcy Court has declined to accommodate. *See Order* attached hereto as Appendix "3."

The MPV Confirmation Order also mirrors the Armstrong Confirmation Order, in that it provides:

> *Litigation Injunction*. Armstrong, the Donald E. Armstrong Family Trust, the Donald E. Armstrong Charitable Remainder Unitrust, and any other entity related to Armstrong and controlled by him in whole or in part, now or in the future, and any other entity over which Armstrong asserts actual control in whole or in part, now and in the future, their agents, attorneys and those acting in concert with them, are hereby permanently enjoined from commencing or continuing any litigation against Steppes Apartments, Ltd. ("Steppes"), . . . and any and all other attorneys of Steppes and their law firms and all employees of such firms, Roger G. Segal as trustee in *In re Mountain Pacific Ventures, Inc.*, Bankr. Case No. 99-22588, Kenneth A. Rushton, ("Rushton") Trustee in *In re Donald E. Armstrong*, Bankr. Case No. 00-26592, and those parties' principals, professionals, agents, and assigns based upon (1) claims or causes of action released pursuant to the terms of the Plan and the Settlement Agreement, and (2) claims or causes of action based upon action taken by the Trustees, the Steppes Parties (all as defined in the Settlement Agreement) and any of those parties'

> principals, professionals, agents, and assigns in effectuating the Settlement Agreement and the Plan. *See also* Fed. R. Bankr. P. 3016(c)(2002).
>
> Armstrong must apply to this Court for authority to commence litigation against any of these parties or their principals, professionals, agents, or assigns, must show that the proposed litigation does not violate the terms of this Plan, and must provide reasonable notice and opportunity to respond to the party against whom Armstrong wishes to proceed. The Court will grant such authority only upon a finding that such litigation does not violate the terms of this Plan, and this Litigation Injunction. If Armstrong applies to the Court to pursue such litigation and his application is denied, then the party or parties responding to the application shall be awarded reimbursement of attorneys' fees and costs reasonably incurred in connection with the application, which the Court, in its discretion, may assess against Armstrong and/or which may be paid from funds remaining in the estate or from the Armstrong Estate under Paragraph 1.9 of the Settlement Agreement.

(Hereinafter referred to as the "MPV Litigation Injunction.")

A notice that the MPV Plan was to become effective was filed and served on or about July 15, 2002. By checks mailed or otherwise delivered on July 29, 2002, the Trustee paid unsecured claims, in full, with interest. Armstrong negotiated five (5) checks, totaling in excess of $20,000, paid to Armstrong on the unsecured claims that Armstrong purchased in the MPV Bankruptcy.

Under the MPV Plan, Rushton has received the stock in MPV and is now the sole shareholder and director of MPV. Rushton has been substituted as plaintiff in the "wrongful lien" litigation pursued by Respondent against Steppes, and has dismissed that adversary proceeding, with prejudice. *See Order Approving the Stipulated Motion of Kenneth A. Rushton, Chapter 11 Trustee, Chapter 11 Trustee of the Estate of Donald E. Armstrong to Dismiss This Litigation*, attached hereto as Appendix "4."

REASONS TO DENY THE PETITION

Armstrong's Petition does little to dispute the premise upon which his appeal of the MPV Confirmation Order was dismissed as moot. Specifically, the United States District Court for the District of Utah held that the Plan of Reorganization confirmed in the MPV case has been substantially consummated and it is "neither reasonable, equitable nor possible to unravel what has been accomplished under the terms of the Confirmed Plan." (*See Order* attached as Appendix B to Armstrong's Petition at p. 5a). Indeed, that is the case. There is "a point beyond which [appellate courts] cannot order fundamental changes in [the] reorganization" process. *In re GWI PCS 1 Inc.*, 230 F.3d 788, 799 (5th Cir. 2000). This recognition has given rise to the doctrine of "equitable mootness," under which an appellate court may decline to consider an appeal "when there has been substantial consummation of the plan so that effective judicial relief is no longer available." *Id* at 799-800. The doctrine of equitable mootness:

> centers on the important public policy favoring orderly reorganization and settlement of debtor estates by affording finality to the judgments of

> the bankruptcy court. . . . [I]n absence of a stay, interested parties are free to implement the confirmed reorganization plan according to its terms, and the consequences may moot the matter in dispute. . . . [T]he case is moot if the requested relief would be either inequitable or impractical in light of the change in circumstances.

In re Pritam Realty, Inc., 233 B.R. 619, 624 (D. P.R. 1999) *quoting In re Public Service Co. of New Hampshire*, 963 F.2d 469, 471-473 (2nd Cir. 1992). In this case, in accord with the terms of the MPV Plan all creditors, including Armstrong, have been paid in full. The reorganized debtor is now out of bankruptcy and is wholly owned by Rushton. Virtually every task under the MPV Plan is complete and it is beyond reasonable question that the MPV Plan has been substantially consummated.

Indeed, Armstrong has taken the untenable position of appealing the Order confirming the MPV Plan – notwithstanding the fact that he enjoyed the benefits of the Plan in the form of payment of claims owned by Armstrong, in full, with interest. Armstrong argues that the Respondent could have paid all such "legitimate" creditors in this bankruptcy case, in full, on September 7, 2001, without the MPV Plan and the Plan Settlement and infers that creditors (including Armstrong) may keep their distributions even if the MPV Confirmation Order is reversed. That argument is spurious. Without the Plan Settlement, payment of all unsecured claims was impossible, regardless of the status Steppes' claim, because Armstrong himself filed a Proof of Claim against the estate of MPV in the amount in excess of $400,000.00. These claims were owned by Rushton as a result of the filing of Armstrong's bankruptcy case. Absent the Plan Settlement, there was

not enough money to pay the claims held by Rushton and other unsecured creditors – excluding Steppes. If Armstrong is inferring that the claims held by Rushton were not "legitimate" he should think long and hard about the assertion as HE FILED the claims.

The fact is, at this stage, there is no realistic way to unwind the MPV Plan or the Plan Settlement underlying the MPV Plan in the event that the MPV Confirmation Order is reversed. Such a reversal would raise a quagmire of unanswerable questions: Must suit be commenced against all creditors to recover funds distributed to them under the MPV Plan? If so, what is the legal basis for recovering payments made to creditors who were, in fact, owed the money they were paid and were entitled to such payment pursuant to the Plan? What happens if creditors are financially unable to pay back funds? At this stage, trying to unwind the consummated Plan would be the equivalent of attempting to "unscramble an egg," *see Raskin v. Malloy*, 231 B.R. 809, 813 (D.C. N.D. Okla. 1997), and would adversely effect the interests of innocent creditors who waited for years for distribution from MPV's bankruptcy estate.[3]

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[3] Armstrong's Petition devotes an entire segment to inferring that, because the fraudulent conveyance actions against Armstrong and other litigation commenced by Steppes (which has not been identified by Armstrong) were voluntarily dismissed, without prejudice, appeal of the MPV Confirmation Order is not moot. *See Armstrong's Petition* at pp. 17-18. That argument is a tempest in a teapot. The claims giving rise to those action are released under the Plan Settlement and subsequent Plans of Reorganizations confirmed in the MPV Bankruptcy and the Armstrong Bankruptcy. Any attempt to revive them outside of the context of the Plan Settlement will meet strong resistance from Respondent and from Rushton so long as the confirmations of the MPV Plan and the Armstrong Plan remain intact. Certainly, the dismissal of

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Avoiding that topic, entirely, Armstrong's petition asks this Court to address specific issues as if they can be examined in a vacuum. Respondent replies to those selected issues as follows:

1. THE LITIGATION INJUNCTION

Armstrong infers that this Court can (or should) reverse only that part of the MPV Confirmation Order that contains the MPV Litigation Injunction – leaving the rest in place.

In the first instance, it should be noted that such a ruling would have no effect at all on Armstrong's ability to continue litigation against Steppes, Segal or Rushton. The MPV Litigation Injunction simply mirrors the Armstrong Litigation Injunction, which is, and will remain, in place as the Armstrong Confirmation Order that includes that injunction was not timely appealed.

Moreover, segregating the MPV Litigation Injunction from the rest of the MPV Plan confirmed in the MPV Bankruptcy is not a realistic possibility. The MPV Litigation Injunction was an integral part of the Plan Settlement and is part of the consideration that Steppes and Rushton bargained for when agreeing to withdraw and subordinate (respectively) their claims in order to allow payment of other unsecured claimants. It is simply not possible for this Court to selectively enforce the benefits of the Plan Settlement for the bankruptcy estate of MPV

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litigation post-confirmation of the MPV Plan contributed to the mooting of Armstrong's appeal. However, the core of the mootness argument is that *creditors have been paid* with the money available by virtue of the Plan Settlement and that action simply cannot be reversed.

(that is the subordination and withdrawal of claims) while denying Steppes and Rushton the benefits they obtained under that Settlement. It is well established that a creditor (which is exactly the position that Armstrong holds in relation to MPV's bankruptcy case) may be enjoined by a bankruptcy court where such an injunction is central to a Plan of Reorganization. *See, e.g., SEC v. Drexel Burnham Lambert Group (In re Drexel Burnham Lambert Group)*, 960 F.2d 285, 293 (5th Cir. 1992). In this case, the Plan Settlement was the core of the MPV Plan without the Plan Settlement whether or when creditors would get paid was deeply in question. With it, all creditors were paid in full and assets were returned to the shareholder.

To circumvent this reality Armstrong relies upon authorities such as *Feld v. Zale Corporation (In re Zale Corporation)*, 62 F.3d 746, 756-57 (5th Cir. 1995), which held that a bankruptcy court has no jurisdiction to enjoin third parties from pursuing litigation When the litigation is not property of the bankruptcy estate or does not effect the estate. Such precedent has no bearing on the case at bar. In this case, the Plan Settlement settles *only* claims that are property of the MPV Bankruptcy estate, claims that are property of the Armstrong Bankruptcy estate (including the claims of Trusts against Steppes, as those claims are also property of the Armstrong Bankruptcy estate[4]) and claims

[4] Armstrong argues that the Trusts rights were impaired without notice to the beneficiaries. Armstrong Petition at p. 13. As noted by the Bankruptcy Appellate Panel for the Tenth Circuit, Armstrong has no standing to invoke the rights of any third parties – including alleged beneficiaries of the Trusts. *Armstrong v. Rushton (In re Armstrong)*, 294 B.R. 344, 359 (BAP 10th Cir. 2003). Indeed, no party has standing to challenge confirmation of a Plan of Reorganization based upon alleged harms to third parties. *In re Sweetwater*, 57 B.R. 743, 746-77 (D. Utah 1985) *accord Tippet v. Umpqua Shopping Center, Inc. (In re Umpqua*

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held by Steppes against the bankruptcy estates. Those claims include the claims arising from the Texas Modified Judgment,[5] the fraudulent conveyance actions commenced by Steppes against MPV and Armstrong (pre-petition), the wrongful lien claim that the MPV Bankruptcy estate held against Steppes and the claims that Rushton, as successor to Armstrong, asserted against MPV. None of those claims is an independent claim that belongs, in any fashion, to Armstrong. No party who was a stranger to the bankruptcy estate or the settlement is released under the Plan Settlement.[6] As a matter of law, third parties are not allowed

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Shopping Center, Inc)., 111 B.R. 303, 305 (BAP 9th Cir. 1990). Moreover, prior to the Armstrong Confirmation Order, Armstrong claimed to be Trustee of the Trusts and had notice of the confirmation proceeding. *Id.* After the Armstrong Plan was confirmed, the interest of Armstrong in the Trusts was vested in Rushton, who not only had notice of the MPV Plan, he voted for confirmation of that Plan.

[5] Inexplicably, Armstrong argues that Steppes can pursue the Texas Modified Judgment against Armstrong. *Armstrong's Petition* at p. 13. That is not correct. Armstrong's discharge is intact and, accordingly, while the Plan Settlement and the MPV Plan do not void the Texas Modified Judgment, Steppes is enjoined, under 11 U.S.C. Section 524 from pursuing that judgment against Armstrong. Unless and until the bankruptcy court determines that Armstrong's post-confirmation conduct gives rise to further litigation, that injunction remains in place. The court presiding over MPV's bankruptcy case has no jurisdiction over that discharge and MPV's bankruptcy case cannot and will not be the venue for further litigation over that matter, which will rest with the bankruptcy court presiding over Armstrong's Bankruptcy – governed by the Armstrong Confirmation Order.

[6] For the record, Armstrong has already sued Respondent and Respondent's counsel (as well as multiple professionals involved in the Armstrong Bankruptcy). In fact, such actions are, likewise, property of the estate and, even prior to the MPV Litigation Injunction, Armstrong could not, unilaterally – and without relief from the automatic stay, pursue such actions. For that reason (and because Armstrong could not articulate a valid cause of action against the Respondent or his counsel)

(Continued on following page)

to assert claims that are property of a bankruptcy estate. *See In re Greenberg*, 266 B.R. 45, 47 (Bankr. E.D.N.Y. 2001). Moreover, "[o]nce a plan is confirmed neither a debtor nor a creditor can assert rights inconsistent with its provisions." *First Union Commercial Corp. v. Nelson, Mullins, Riley & Scarborough* (*In re Varat Enter., Inc.*, 81 F.3d 1310, 1317 (4th Cir. 1996). Thus, the MPV Litigation Injunction, for the most part, simply recited a legal axiom: Neither Armstrong nor any entity may litigate claims that were resolved under the Plan.

Unfortunately, Armstrong has, historically, been unable to distinguish between the claims held by the bankruptcy estates of MPV and Armstrong and his own claims and he continues, largely, to pursue multiple litigation efforts in an attempt to attack the Texas Modified Judgment. *See In re Armstrong*, 309 B.R. at 807. Noticeably absent from Armstrong's Petition is any reference to any independent claim held by Armstrong that he would like to litigate. The *only* part of the MPV Litigation Injunction that extends beyond a simple recitation of existing law is the language that required Armstrong to seek bankruptcy court authority before filing any action against the parties to the Plan Settlement. Thus, there is no absolute injunction in the MPV Plan that prevents Armstrong from pursuing his own claims. The MPV Litigation Injunction simply provides a mechanism whereby, if Armstrong has independent claims against any parties to the Plan Settlement, he is entitled to secure authority to bring them, while protecting the MPV Plan and the Armstrong Plan from being

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Armstrong's suits against Respondent and his counsel was dismissed. *See Order* attached hereto as Appendix "5."

undermined by Armstrong's perpetual inclination to litigate regarding the claims that were settled by confirmation of those Plans. Orders such as the MPV Litigation Injunction that are required to protect the integrity of the estate are permitted under the Bankruptcy Code. *In re Energy Co-op.* 886 F.2d 921, 930 (7th Cir. 1989).

2. THE TEXAS MODIFIED JUDGMENT

Armstrong's Petition contains an extensive lament about the injustice of the Texas Modified Judgment. (Armstrong's Petition at pp. 18-23). In fact, the Texas Modified Judgment has already been litigated through all possible channels. It was appealed to the Texas Court of Appeals. Three Petitions for review were filed with the Texas Supreme Court. A Petition for Writ of Certiorari was filed with, and denied by, this Court. *Armstrong v. Steppes Apartments Ltd.*, 57 S.W.2d 37 (Tex. App. – July 6, 2001), *rev. denied,* (3 pets) (January 10, 2002), *cert. denied,* 536 U.S. 95, 122 S.Ct. 2645, 153 L.Ed.2d 823 (2002). The bankruptcy court simply did not provide a venue for further review of the Texas Modified Judgment. In fact, as pointed out by the Bankruptcy Appellate Panel for the Tenth Circuit, the *Rooker-Feldman* doctrine, which prohibits a federal court from acting as an appellate court on a state court judgment – even when the losing party asserts that the state court violated the loser's federal rights, barred such a review. *Armstrong v. Rushton* 294 B.R. 344, 357 and n. 13, *quoting Johnson v. Grundy*, 512 U.S. 997, 1005-06, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). When entering into the Plan Settlement, Respondent recognized that law and, frankly, considered the possibilities of litigation approaches that might make an exception for the circumstances of the MPV Bankruptcy. When the Plan

Settlement reached the point that it gave rise to Steppes withdrawing its claim against the MPV estate, provided payment for all MPV's creditors and was supported by Rushton as MPV's sole shareholder (Rushton), the risk of creative litigation to overcome well-established law was neither reasonable nor wise for the bankruptcy estate. There is no injustice, therefore, in the fact that the MPV Plan was confirmed, whether or not the Texas Modified Judgment was, in Armstrong's opinion, a violation of his rights under the Eighth Amendment to the United States Constitution.

3. THE SUZUKI

Armstrong's claims regarding the Suzuki are far from fodder for derailing confirmation of the MPV Plan nor do they merit consideration, by certiorari, in this Court. Armstrong must re-invent history even to advance an argument. The truth regarding the Transwest claim is as follows: Transwest was listed by Armstrong as an oversecured creditor, with a claim of $7,315.90 secured by the Suzuki owned by MPV with a value of $8,000.00. No unsecured claim (indeed, no proof of claim at all) was filed by Transwest. The Suzuki has remained in Armstrong's possession for Armstrong's use because the Respondent Trustee did not want to leave Armstrong without a vehicle and it did not appear necessary to liquidate that collateral to pay claims of creditors. MPV did not use or have possession of the Suzuki and Armstrong never paid MPV for the use of the Suzuki. Armstrong, (and accordingly Armstrong's bankruptcy estate) not MPV, was the obligor on the loan to Transwest.

Armstrong purchased the claim of Transwest and asserted, at the time of confirmation of the MPV Plan that

he wanted MPV to pay him the value of the Suzuki at the time the bankruptcy was filed – plus interest *and* he wants to keep the car-making himself into a hybrid "secured and unsecured" creditor – though no debt was owed by the estate. To resolve the issue, the MPV Confirmation Order in this case directed Armstrong to turn the Suzuki over to the Respondent for sale, within 60 days of the entry of the Confirmation Order and directed the Respondent to sell the vehicle and turn the proceeds over to the holder of the Transwest claim (as the Suzuki was collateral for the Transwest loan). *See MPV Confirmation Order* at Appendix "C" to Armstrong's Petition, at p. 9(a). The MPV Confirmation Order then provides that the holder of the Transwest claim could file an unsecured claim for any deficiency – and gave the Respondent an opportunity to object to that claim. Any allowed claim ultimately allowed was to be paid in full. *See MPV Confirmation Order* at Appendix "C" to Armstrong's Petition, at p. 9(a). In the alternative, the MPV Confirmation Order provides that the Suzuki could be retained by the holder of the Transwest claim, in full satisfaction of its claim. *See MPV Confirmation Order* at Appendix "C" to Armstrong's Petition, appendix p. 9(a).

The Suzuki was not turned over for sale. No unsecured claim was filed to which the Trustee could object and that, simply is the end. With that, the Bankruptcy Court held that the Transwest claim had been satisfied by surrender of the collateral. *See Order* attached hereto as Appendix "3." Armstrong is upset that he did not manage to keep the car and find a way to make MPV to pay him for the obligation secured by the car – which was an obligation actually owed by the Armstrong Bankruptcy estate. Armstrong's complaint is shallow and provides no

grounds for overturning confirmation of the MPV Plan which provided payment of all allowed unsecured claims, in full (with interest). It should be noted that Armstrong himself received and accepted over $20,000.00 in distributions on unsecured claims he purchased, post-petition, from creditors of MPV. He did not return those funds nor complain that he was not entitled to distribution as the MPV Plan should not have been confirmed. He has not tendered the money back to the MPV Bankrutpcy estate or offered alternate realistic mechanisms for paying all other creditors that were paid. Armstrong simply wants litigation to continue, ad nauseam. It should not. The MPV Plan was confirmed and has been consummated. Accordingly, the United States District Court for the District of Utah and the United States Court of Appeals for the Tenth Circuit, in turn, correctly held that Armstrong's appeal from the MPV Confirmation Order was moot.

CONCLUSION

Based upon the forgoing points and authorities, Respondent respectfully requests the Armstrong's Petition for Writ of Certiorari be denied.

Respectfully submitted,

JULIE A. BRYAN
Counsel for Roger G. Segal, former Trustee of the Chapter 11 Bankruptcy Estate of Mountain Pacific Ventures, Inc. and Disbursing Agent Under the MPV Plan

APPENDIX

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APPENDIX 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

* * *

In re:	)	
	)	
MOUNTAIN PACIFIC VENTURES, INC.,	)	Case No. 99-22588
	)	
Debtor.	)	
MOUNTAIN PACIFIC VENTURES,	)	
	)	
Plaintiff,	)	
	)	Case No. 99-2218
vs.	)	
	)	
STEPPES APARTMENTS, LTD.,	)	
	)	
Defendant.	)	

* * *

BEFORE THE HONORABLE GLEN E. CLARK

Thursday, May 24, 2001

1:30 P.M.

CROSS MOTIONS FOR SUMMARY JUDGMENT

ALPHA COURT REPORTING
SERVICE
P.O. Box 510047
Salt Lake City, Utah 84151
(801) 532-5645 Fax 595-8910

Reported By:
Pam Smith, CSR, RMR
File No. 52401

* * *

[29] of this property.

THE COURT: I agree with that.

MR. JEFFREY L. SHIELDS: That has a very good reason, Your Honor. If Mr. Armstrong had continued to be able to convey property with our claim pending and them not having notice of that they would have been the BFP.

THE COURT: And very possibly your lis pendens whether wrongful or not, and particularly if wrongful, benefited Mountain Pacific ventures because it kept Mr. Armstrong from transferring it elsewhere.

I think that's an argument that you're going to make, and I – I'm not sure from your briefs – I know you both cite Winters versus Schulman but – and this isn't a damage phase anyway, but I think you ought to be aware of the Utah Court of Appeals April 5th decision in that case with respect to damages. It's – I'm just telling you that. You and everyone else that, so you know. It seems very limiting to me.

MR. JEFFREY L. SHIELDS: Okay. Your Honor, do you have any other questions or –

THE COURT: No. I think I've gone through what I was thinking on that particular issue.

MR. JEFFREY L. SHIELDS: Why don't I just stay on the issue. I was going to present that at the end but I think it makes sense for me to finish my argument on that

* * *

[67] fear.

MS. BRYAN: I'll try to hit the high points, Your Honor, and there is – there are a lot of matters addressed here and I trust Your Honor – Your Honor's trusty assistant to thoroughly review it and understand it. I've never seen you to do otherwise, so bear with me if I miss something.

In the Schulman action addressing the wrongful lien claim there – Mr. Shields has distinguished that case on the basis that there was no pending action. I would note for this court that in fact in Schulman there was a pending divorce action on appeal and the Schulman court specifically noted that even were that considered a pending action the lis pendens did not affect rightful title to property and therefore was a wrongful lien. So that distinction simply does not fly.

At the same time Schulman noted that creative pleading does not change the nature of an action to collect a money judgement. Doesn't matter what it is characterized at to the extent that it is a money – an action to collect a money judgment, a rose by any other name is just that.

THE COURT: You know how much money the ultimate victim of the wrongful lis pendens in Schulman got?

MS. BRYAN: You know, I do not know the answer to that.

[68] THE COURT: That's why I didn't think either of you understood when I said there's a new Schulman case. The victim of the wrongful lis pendens got one thousand dollars.

MS. BRYAN: And I understand, Your Honor, that damages is wholly another issue. And has been of some concern.

THE COURT: As practical people we need to think about that.

MS. BRYAN: And we have thought about it at some great length. The legal issue is what we're trying to get at.

Let's see. The repetitive comments of Mr. Shields that the lis pendens should attach to, quote, unquote, other property transferred to MPV and the reference to $500,000 that was used, I would ask the court to look at paragraph 71 of Steppes' objection to the motion for summary judgment in this case which says upon information and belief. We think some of that money may have gone to MPV. Way too late in this proceeding for upon information and belief.

It was incumbent upon Mr. – upon Steppes to understand what it was trying to attach or obtain a – and the correct language under the Utah statute is not lien, it's encumbrance, lien or encumbrance. Before Steppes encumbered property it was to identify it and note that it claimed an interest in that property. There hasn't been or wasn't such

* * *

APPENDIX 2

IN THE UNITED STATES BANKRUPTCY COURT DISTRICT OF UTAH, CENTRAL DIVISION

In re: **DONALD E. ARMSTRONG,** Debtor SSN: 308-56-3353	Bankruptcy No. 00-26592-JAB (Chapter 11) Honorable Judith A. Boulden

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DATED JANUARY 31. 2002. CONFIRMING AND APPROVING TRUSTEE'S SECOND REVISED PLAN OF REORGANIZATION DATED NOVEMBER 19, 2001 [Docket no. 573] AND GRANTING RELATED MOTIONS [Docket nos. 612, 613, and 695]

The Trustee's Second Revised Plan of Reorganization Dated November 19, 2001 (the "Plan")[1] filed under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, et seq., was filed by Kenneth A. Rushton, Chapter 11 trustee in this case (the "Trustee"). Following the Court's approval of the Disclosure Statement for the Trustee's Second Revised Plan of Reorganization Dated November 19, 2001 (the "Disclosure Statement") by Order entered November 20, 2001, the Disclosure Statement, Plan, notice of hearing and, where appropriate, a ballot, were transmitted to

[1] Capitalized terms in this Order will have the meaning assigned to them in the Plan unless otherwise noted.

creditors and Donald E. Armstrong, the debtor ("Armstrong" or the "Debtor"). Hearings were held on December 20, and 21, 2001, and on January 4, 11, 14, 15, 17, and 23, 2002 to consider confirmation of the Plan and the following related motions: Motion for Temporary Allowance of Claim filed by Steppes Apartments, Ltd. [docket no. 606] (the "Steppes Temporary Allowance Motion"); Motion for Estimation of Claim Number 1, Claim of Steven R. Bailey, Trustee of Willow Brook Cottages, L.L.C. [docket no. 648] (the "Willow Brook Estimation Motion"); Trustee's Motion dated December 18, 2001, Pursuant to 11 U.S.C. § 1126(e) for Designation of: (1) Donald E. Armstrong as an Entity Whose Rejection of the Plan Was Not in Good Faith; and (2) General Unsecured Creditors Who Reject the Plan as Entities Whose Rejections Were Not Solicited in Good Faith; Trustee's Alternative Motion under Bankruptcy Rule 3018(a) to Change Vote; Trustee's Motion Temporary Allowance of Certain Claims [docket no. 695] (the "Trustee's Voting Issues Motion"); Motion Dated November 30, 2001 Pursuant to Bankruptcy Rule 9019 and Bankruptcy Code Section 1123(b)(3) for Approval of Settlement Among Kenneth A. Rushton, Steppes Apartments, and Roger G. Segal [docket no. 613] (the "Steppes Settlement Motion"); and Motion Pursuant to Section 521(4) and Section 105(a) for Debtor to Comply with Duty to Surrender Property of the Estate Dated November 30, 2001, Motion for Valuation of Surrendered Property; Motion for Assumption of Executory Contract to the Extent Necessary [docket no. 612] (the "Surrender Motion"). Appearances were made at the hearings as noted on the record.

One objection was timely filed to the Plan by the Debtor, styled as Objections to Proposed Plan of Reorganization and Settlement Agreement between Steppes

Apartments, Ltd., Kenneth A. Rushton, and Roger G. Segal [docket no. 705]. On January 23, 2002, the Debtor untimely filed his Additional Objections to Proposed Plan of Reorganization and Settlement Agreement between Steppes Apartments, Ltd., Kenneth A. Rushton, and Roger G. Segal [docket no. 785] (together, these two objections will be referred to as the "Debtor's Objection"). The Debtor also filed his Memorandum in Opposition to Motion for Temporary Allowance of Claim Filed by Steppes Apartments, Ltd. [docket no. 703], his Memorandum in Opposition to Motion for Debtor to Comply with Duty to Surrender Property of the Estate; Motion for Valuation of Surrendered Property, Motion for Assumption of Executory Contract to the Extent Necessary by the Trustee [docket no. 704], and his Objection to Motion for Estimation of Claim No. 1, Claim of Steven R. Bailey, Trustee of Willow Brook Cottages, L.L.C. [docket no. 706] in opposition to related motions.

The Court, by separate Order dated January 17, 2002, temporarily allowed the claims of Steppes Apartments Ltd. (Steppes) ("Steppes Estimation Order") for voting purposes as a Secured Claim in the amount of $120,795 and as an Unsecured Claim in the Amount of $1,398,979 [docket no. 775]. The Court also orally estimated the claim of Steven R. Bailey as trustee in the Willow Brook Cottage's case in the amount of $81,997.24. Execution of that order is pending.

The Court has reviewed and considered the Plan, the Trustee's Motion to Approve Settlement, the Trustee's Voting Issues Motion, and the Surrender Motion (and objections thereto). The Court has also previously ruled on the Steppes Temporary Allowance Motion and the Willow Brook Estimation Motion, and incorporates the same

herein. The Court has reviewed and considered memoranda filed in connection with the Plan, the Debtor's Objection, documentary and oral evidence presented and proffered, the credibility of witnesses, the argument of counsel and the Debtor made at the hearings, and has made an independent review of applicable statutes and case law. Accordingly, the Court finds and concludes pursuant to Bankr. Rule 9014 and Fed. R. Civ. P. 7052, as follows:

A. *Jurisdiction.* All proceedings noted are core proceedings under 28 U.S.C. § 157. This Court has jurisdiction with respect to these proceedings under 28 U.S.C. § 1334.

B. *Notice.* Notice to parties in interest of the time fixed for filing objections and the hearing to consider confirmation of the Plan has been given and is sufficient pursuant to applicable law under, among other provisions, Sections 1126, 1128 and 1129 of the Bankruptcy Code and Fed. R. Bankr. P. 2002, 3017, 3018 and 3019. Notice of the Litigation Injunction was described in specific and conspicuous language in both the Disclosure Statement and the Plan, and the parties to which it applies were specified by name and category. The Steppes Settlement Agreement was properly noticed pursuant to Fed. R. Bankr. P. 9019(a). The solicitation package with respect to the Plan (which included the Plan and Disclosure Statement, the Court's Order fixing deadlines and the hearing date on confirmation of the Plan, a notice regarding objection and voting deadlines and hearing on confirmation of the Plan and, where applicable, a ballot) was properly served on all necessary parties [docket no. 581]. The Trustee has satisfied his obligations with respect to service of these documents on parties in interest. Copies of the Willow Brook

Estimation Motion, the Trustee's Voting Issues Motion, and the Surrender Motion, and notices of hearing and right to object thereto, were also properly served on all necessary parties.

C. *Acceptance*. The balloting process on the Plan as conducted by the Trustee has been proper; the Debtor's interference with the balloting process has been remedied in an appropriate manner; and the Plan has been accepted in writing by the creditors whose acceptance is required by law.

D. *Debtor's Objection*. The Debtor's Objection has been considered by the Court and is overruled. The Debtor's objections to the Willow Brook Estimation Motion, the Trustee's Voting Issues Motion, and the Surrender Motion have been considered by the Court and are overruled.

E. *Plan Conditions to Confirmation*. All conditions to Confirmation set forth in the Plan have been satisfied or effectively waived.

F. *Section 1129(a)(1)*. The Plan complies with the applicable provisions of the Bankruptcy Code, including without limitation the provisions of the Bankruptcy Code respecting classification of claims and the requirements of Section 1123 of the Bankruptcy Code.

G. *Section 1129(a)(2)*. The Trustee has complied with the applicable provisions of the Bankruptcy Code.

H. *Section 1129(a)(3)*. The Plan has been proposed in good faith and not by any means forbidden by law.

I. *Section 1129(a)(4)*. All trustee compensation and professional compensation and reimbursement of expenses

for services and costs in or in connection with the case and in connection with the Plan and incident to the case has been approved or are subject to the approval of the Court as reasonable.

J. *Section 1129(a)(5).* The identity, qualifications, and affiliations of the person to be Plan Trustee after confirmation have been disclosed, and the appointment of Kenneth A. Rushton to such position is equitable, consistent with the interests of creditors and the Debtor, and with public policy. The nature of the Plan Trustee's compensation has been fully disclosed.

K. *Section 1129(a)(6).* The Plan does not propose any changes of rates under the jurisdiction of any regulatory body and this section is therefore not applicable in this case.

L. *Section 1129(a)(7).* Each holder of a Claim or equity interest has accepted the Plan or will receive or retain under the Plan property of a value, as of the effective date of the Plan, that is not less than the amount that such holder would receive or retain if the Debtor were liquidated under Chapter 7 of the Bankruptcy Code on such date.

M. *Section 1129(a)(8).* Exhibit no. 246 sets forth the voting results of ballots returned with respect to the Plan. Class 1 is not impaired. Classes 2A and 2C have voted to accept the Plan because the only creditor in each of those classes voted to accept the Plan, and the Court temporarily allowed or estimated the claim in each of those Classes for voting. With respect to Class 4, the Court ruled orally

on the Trustee's Voting Rights Motion[2] that the Claims of Enis & Gilchrist, Linda Jenkins, and Robert Smith (collectively, the "Disputed Class 4 Claims") were held 70% by the Trustee and 30% by the Debtor pursuant to the Court's Order [docket no. 353] which approved a transfer to the Debtor of rights against creditors holding those Claims with the proviso that the Estate would receive 70% of any collection or recovery against the holders of such claims. The Debtor purported to vote the full amount of each of the Disputed Class 4 Claims as rejecting claims in Class 4. Following the Court's ruling, the Trustee voted whatever portions of the Disputed Class 4 Claims he holds in favor of the Plan. In voting the Disputed Class 4 Claims, the Trustee asserted the right as the majority owner of those claims to vote the full amount of each claim as an accepting claim in Class 4. Whether the Trustee votes the full amount of the Disputed Class 4 Claims or 70% of them, or whether each of these claims is treated as two claims for voting purposes to be voted by the Trustee and the Debtor, Class 4 has voted to accept the Plan because creditors who hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by such creditors have voted to accept the Plan.[3] 11 U.S.C.

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[2] The Court's ruling on the Trustee's Voting Rights Motion is reduced to writing in this Order.

[3] If the Trustee is permitted to vote the full amount of the Disputed Class 4 Claims, then 8 Claims voting in that Class voted to accept the Plan and 4 voted to reject, with claims totaling $1,604,25.22 [sic] voting to accept and $89,774.87 voting to reject the Plan. If the Trustee is permitted to vote 70% of each Disputed Class 4 Claim and the Debtor 30% (with the Disputed Class 4 Claims being split for purposes both of number of claims voting and for amounts voted, then the voting in Class 4 is 7.1 votes to accept the Plan and 4.9 votes to reject the Plan, with claim amounts totalling $1,569,024.76 in favor of the Plan and $125,009.33 against the Plan. If each of the Disputed Class 4 Claims is

(Continued on following page)

§ 1126(c). Under the reasoning of *In re RUTI-Sweetwater, Inc.*, 836 F.2d 1263, 1267 (10th Cir. 1988), Classes 2B, 2D, 2E, and 3A are deemed to have accepted the Plan because no one in those secured classes voted on the Plan or objected to the Plan. There are no creditors in Class 2F or 3B.

N. *Section 1129(a)(9).* Except to the extent that a holder of a particular claim has agreed to a different treatment of such claim, the Plan satisfies the requirements of Section 1129(a)(9) with respect to the payment of claims having priority under Section 507 of the Bankruptcy Code.

O. *Section 1129(a)(10).* Classes 2A, 2C, and 4 are impaired classes that have voted to accept the Plan, determined without including any acceptance of the Plan by any insider.

P. *Section 1129(a)(11).* Confirmation of the Plan is not likely to be followed by the further liquidation or the need for further financial reorganization of the Debtor except as provided in the Plan.

Q. *Section 1129(a)(12).* All fees under 28 U.S.C. § 1930, as determined by the Court at the hearing on confirmation of the Plan, have been or will be paid on the effective date of the Plan.

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split so that each would be counted as two votes in Class 4, but the Trustee would vote 70% of each Disputed Class 4 Claim and the Debtor 30% of each Disputed Class 4 Claim, the result would be 8 votes to accept the Plan, 4 votes to reject the Plan, with claims totaling $1,569,024.76 in favor of the Plan and $125,009.33 against the Plan. in each of these three alternative scenarios, the requirements of Section 1126(d) for acceptance of the Plan are met with respect to Class 4.

R. *Section 1129(a)(13).* Section 1129(a)(14) is inapplicable in this case.

S. *Section 1129(b).*

(1) *Class 5.* The requirements of Section 1129(b) of the Bankruptcy Code have been met with respect to Class 5 under the Plan because the Plan does not discriminate unfairly, and is fair and equitable with respect to Class 5, in that the Plan provides that no holder of an interest in a class junior to Class 5 will receive or retain under the Plan on account of such junior interest any property. There is no class of interests junior to Class 5.

(2) *Alternative Cramdown Findings with Respect to Classes 2B, 2D, 2E, and 3A.* The Court has found and concluded that Classes 2B, 2D, 2E, and 3A are deemed to have accepted the Plan pursuant to *In re RUTI-Sweetwater,* 836 F.2d 1263 (10th Cir. 1988). Alternatively, the requirements of Section 1129(b) of the Bankruptcy Code have been met with respect to Classes 2B, 2D, 2E, and 3A under the Plan because the Plan does not discriminate unfairly, and is fair and equitable, with respect to these Classes, in that the Plan provides for the sale or abandonment of the property securing such claims with the holder of such claim receiving thereby either the property securing such claims or the proceeds of such sale to the extent of the allowed amount of such claim.

3. *Alternative Cramdown Findings with Respect to Class 4.* Based on rulings of the Court related to votes in Class 4, the Court has found that Class 4 is an accepting class of claims. Alternatively, the requirements of Section 1129(b) of the Bankruptcy Code have been met with respect to Class 4 under the Plan because the Plan does not discriminate unfairly, and is fair and equitable, with

respect to Class 4, in that the Plan provides that no holder of a class of claims junior to Class 4 (there are none) or that a class of interests will receive or retain under the Plan on account of such interest any property. If it is determined on appeal that Class 4 is not an accepting class, interest on Allowed Unsecured Claims will accrue from the effective date of the Plan at the legal rate under 28 U.S.C. § 1961 and will be paid prior to any distribution to the holder of the Class 5 interest.

T. *Trustee's Voting Rights Motion.* The Court previously made findings of fact and conclusions of law on the Trustee's Voting Issues Motion on the record on January 15, 2002. In addition to those rulings which are incorporated herein, the Court determines that by his actions in sending letters to all or virtually all of the creditors of this estate making false and misleading statements regarding the case and the legal effect of actions taken therein, the Debtor has tainted the voting on the Plan. It is impossible to know how many creditors did not vote on the Plan because of the Debtor's actions or how his actions may have impacted those who did vote. The Debtor's actions in distributing two letters to virtually all creditors in this case was done in bad faith. The letters distributed by the Debtor were replete with statements of law and fact that the Debtor knew to be misstatements and knew to be inaccurate, and the letters misrepresented the circumstances of the Plan. Further, the Debtor knew he was prohibited from distributing those misstatements to creditors, and knew some of the issues in his letters had been discussed by the Court at length at the disclosure statement hearing. Nonetheless, the Debtor knowingly and intentionally circulated the misinformation in an attempt to improperly influence creditors' votes.

In spite of the Debtor's bad faith effort to improperly influence voting, ballots cast in all classes voting on the Plan voted to accept the Plan except for Classes 4 and 5. The Debtor purported to vote the Disputed Class 4 Claims in spite of the fact that the 70% majority ownership interest in such claims is held by the Estate. The Trustee had not and has not abandoned the Estate's interest in the Disputed Class 4 Claims pursuant to the Disclosure Statement or any order approving the Disclosure Statement. Such rights to the Disputed Class 4 Claims are vested rights and are not residual rights. The Trustee's rights to assert ownership by the Estate over the Disputed Class 4 Claims arose and vested prior to the Confirmation Date of this Plan and, thus, any abandonment provision under the Plan does not affect the Trustee's rights to the Disputed Class 4 Claims including the provision 7.3 of the Plan. Rather, the Trustee has asserted the Estate's ownership of 70% of the Disputed Class 4 Claims, which ownership interest has vested and been recognized by this Court, and the Trustee has been allowed by this Court to vote the Estate's ownership interest in the Disputed Class 4 Claims. The Trustee does not abandon, pursuant to the Plan, the Estate's ownership interest in the Disputed Class 4 Claims. With respect to any residual rights or claims (not including in any way the Disputed Class 4 Claims) of the Estate and Trustee under the Order Approving Trustee's Motion for Sale [exhibit no. 212) and as to which no settlement or disposition vested rights in the Trustee prior to the Confirmation Date, such residual rights are abandoned pursuant to Section 7.3 of the Plan.

U. *Steppes Settlement Motion.* The parties entered into a settlement agreement among Kenneth A. Rushton, Steppes Apartments, and Roger G. Segal as trustee of the

estate of Mountain Pacific Ventures, Inc. (MPV) (the "Steppes Settlement Agreement"). The Steppes Settlement Agreement resolves Steppes' claims against this Estate premised upon its theories of fraudulent transfer, conspiracy, alter ego, constructive trust, unjust enrichment, and declaratory judgment based upon the Amended Complaint in the case of *Steppes Apartments, Ltd. v. Donald E. Armstrong, et al.*; claims for malicious prosecution, abuse of process, and/or wrongful use of civil proceedings, as set forth in Steppes Nondischargeability Complaint against the debtor; and claims based upon this Estate as the successor-in-interest to the Donald E. Armstrong Family Trust and/or the Donald E. Armstrong Charitable Remainder Unitrust, (the Armstrong Family Trust and Charitable Remainder Unitrust are collectively referred to as the "Trusts"). and/or to the extent that the assets and liabilities of the Family Trust and/or Unitrust are part of this estate. The Steppes Settlement Agreement also resolves this Estate's claims against the MPV Estate based upon asserted fraudulent transfers, and the defense asserted by the MPV estate that the *lis pendens* filed by Steppes against property of MPV consistutes a wrongful lien. In considering whether to approve the settlement, this Court must make an informed decision based upon an objective evaluation of developed facts. *Reiss v. Hagmann*, 881 F.2d 890, 891-92 (10th Cir. 1989) (recognizing the considerations set forth in *American Employers' Insurance Co.*, and applying them to a Chapter 7 context). While the Tenth Circuit has not articulated specific factors for consideration, in *Reiss v. Hagmann*, 881 F.2d at 891-92, the court recognized those factors set forth in *Protective Committee Stockholders v. Anderson*, 390 U.S. 414, 424-25 (1968), and *American Employers' Insurance Co. v. King Resources Co.*, 556 F.2d 471, 475 (10th Cir. 1977). Based

thereon, the Court concludes that the Steppes Settlement Agreement was entered into in good faith, the Steppes Settlement Agreement is fair and equitable and in the best interests of creditors, and the Trustee has properly exercised his business judgment as follows:

(1) *Probability of Success on the Merits.* As this Court found in the Steppes Estimation Order, it is likely that the Debtor and the Estate are liable to Steppes and that Steppes holds significant secured and unsecured claims against the Debtor and the Estate based on theories as set forth above and as described in the Steppes Estimation Order. It also appears that Steppes has suffered significant damages that could be proven at trial. It is unlikely that the Trustee would prevail against Steppes and the Steppes Parties in litigation to any meaningful degree on affirmative claims for damages on account of a *lis pendens* filed by Steppes, for wrongful use of civil proceedings, abuse of process, for conspiracy, or any other cause of action or theory asserted by the Debtor. The Estate faces numerous legal and evidentiary challenges in establishing any claim against Steppes. Furthermore, the testimony of the Debtor respecting his or the Estates claims against Steppes and in support of his defenses against the claims is not credible, and the defenses raised by Armstrong to those claims are not supported by persuasive evidence and are inconsistent with prevailing law. The Debtor has asserted these claims and defenses in the past in various courts and has not prevailed. Judge Sam granted partial summary judgment in favor of Steppes with respect to a counterclaim and defenses asserted in Civil No. 2:97-CV-663ST in the United States District Court for the District of Utah [exhibit no. 86]. Judge Stewart ordered that the Debtor's answer be stricken in the same action and ruled

in favor of Steppes on all claims [exhibit no. 5]. That ruling was never reduced to a written order only because the Debtor filed Chapter 11 shortly after the ruling. The judgments against the Trusts controlled by the Debtor prepetition have been affirmed on appeal by an intermediate Texas State court of appeals and the Texas Supreme Court has denied petitions for review filed by the Debtor and others [exhibit no. 102]. The Debtor's attempts to collaterally attack these Texas judgments have been made in bad faith and in violation of various legal principles. Therefore, the Trustee's assessment of the probability of success on the merits of litigation strongly supports approval of the Steppes Settlement.

(2) *Difficulties to Be Encountered in Collection of a Judgment*. There is no evidence that has been presented that the Trustee would or would not be able to collect a judgment against Steppes if he were to be successful in litigation against Steppes. Thus, this factor does not weigh in favor or against approval of the Steppes Settlement.

(3) *Complexity, Expense, Inconvenience. and Delay in Pursuing Claims*. The claims and defenses asserted by the Debtor against Steppes have resulted in significant expense, inconvenience, and delay to Steppes and to the Estate. Although these claims asserted by the Debtor are convoluted, redundant and based upon the Debtors shifting factual interpretations, they do not appear to be unusually complex. However, the only alternative to the Settlement Agreement is continued litigation between the parties, including the Estate, the Debtor and Steppes, and the Court concludes that continued litigation would exhaust any funds in the Estate before it could he resolved and would consequently eliminate any return to creditors. If the Settlement is not approved, the Court concludes that

continued litigation is inescapable, given the parties past history, pending actions, Armstrong's stated purpose to continue this litigation at all costs, and Steppes apparent resource to fund litigation. Even were one of the parties to succeed at a trial court level, the other would surely appeal until there is no further appeal available. Armstrong, would then, as in the past, attempt to collaterally attack any judgment and refuse to acknowledge any loss or the finality of any judgment. Therefore, if the Steppes Settlement Agreement is not approved, the litigation would continue indefinitely at great expense. This factor supports approval of the Steppes Settlement Agreement, particularly in light of the significant likelihood that the Estate would not be successful in claims asserted against Steppes or in defeating claims asserted by Steppes.

(4) *Interests of Creditors, with Deference to Their Reasonable Views.* Few creditors have participated actively in this case. The majority of creditors voting on the Plan voted to accept the Plan. Only one creditor whose vote was not exercised by the Debtor as part of a settlement with the Debtor voted to reject the Plan. [Ballot Summary attached to exhibit no. 246.] The Steppes Settlement Agreement is in the best interest of all parties inasmuch as it resolves over seven years of litigation and secures for each creditor a reasonable and definable recovery from this estate. Were the litigation to continue, it would consume any moneys the estate may hold and there would likely be no distribution to unsecured creditors or equity interest holders. If the case were converted to chapter 7 because the Steppes Settlement Agreement was not approved, there would also likely be no distribution to creditors, because continued costs of litigation would consume the Estate until it was closed, with no return

other than to administrative claimants, if even they could be satisfied. Under the Steppes Settlement Agreement, the creditors may receive the benefit of full payment of their claims and the Estate will be released of all potential or contingent liability to Steppes and MPV. This Estate will also receive the benefit of a substantial reduction in the amount of Steppes' claim that could be allowed, a result which may not occur if the various adversary proceedings continued. The probability is high that if the issues were fully litigated, a judgment may enter in excess of the Steppes stipulated claims. The Trustee, in entering into the Steppes Settlement Agreement, properly considered the potential outcome of the Texas Litigation (as defined below) and the defenses and claims asserted by the Debtor to Steppes' claims. The Trustee insisted on and obtained, in the Steppes Settlement Agreement, a result that contemplated the possibility of a judgment against Steppes in the Texas Litigation. The Steppes Settlement Agreement is proposed and supported by competent and experienced attorneys, including two Chapter 11 Trustees, their respective counsel, as well as counsel for Steppes. The Steppes Settlement Agreement has also been approved in the MPV bankruptcy case. The Steppes Settlement Amount is within the range of potential outcome of such litigation, defenses and claims if they were actually litigated. *See Kopp v. All American Life Ins. Co. (In re Kopex Realty Venture Co.),* 213 B.R. 1020, 122 (10th Cir. BAP 1997) (recognizing a trustee's authority to enter into settlement agreements and setting forth four elements by which a court can make an informed decision concerning the propriety of a settlement agreement).

(5) *Litigation Injunction,* The Steppes Settlement Agreement, and the Plan, provide for a Litigation Injunction,

more fully described as a permanent injunction enjoining Armstrong, the Trusts, and all other Armstrong Entities from commencing or continuing litigation against the Steppes Parties (as defined in the Steppes Settlement Agreement), Roger Segal, the Trustee, and any of those parties' principals, professionals, agents, and assigns, based upon specific causes of actions set forth therein. The Litigation Injunction further provides, among other things, that Armstrong must apply to this Court for authority to commence or continue any litigation against these parties. Upon independent review of case law, the applicable pleadings, and based on the extensive evidentiary hearings on these matters, as well as considering those actions taken during the pendency of this case, this Court's assessment of the Litigation Injunction is as follows:

The Steppes Settlement Agreement is an essential element supporting resolution of the matters between this Estate and its creditors and requires that the Trustee seek the Litigation Injunction through the confirmed Plan. Failure to approve the Litigation Injunction would undoubtedly have four results: First, it would encourage the filing of a multiplicity of actions by and between Armstrong, Steppes, MPV, and this Estate; second, the ensuing litigation would be costly to this Estate in that this is a liquidation plan and, therefore, the estate holds limited assets that will only he depleted by further litigation; third, it would likely lead to a disorderly and inequitable distribution of assets to creditors, contrary to the contemplation of the Bankruptcy Code, the plan, and the Steppes Settlement Agreement; and fourth, it would result in substantial disruption of the Steppes Settlement Agreement which, in part, releases this Estate's liability to

Steppes. Therefore, absent the Litigation injunction, this Estate would suffer imminent and irreparable harm.

The Litigation Injunction is required for successful consummation of the Plan and payment of creditors in order to restrain further litigation and depletion of assets of the estate. Undoubtedly, the Plan rests on the Trustee's ability to focus his efforts on liquidation, not litigation. Steppes, the Estate and MPV have all made contributions to the Plan by approving the Steppes Settlement Agreement, and Steppes has made an important contribution to reorganization in compromising its claim, and the Plan provides for payment of substantially all of the claims affected by the release.

If the injunction is not granted, the Trustee will be subject to continued litigation and his ability to implement the terms of the confirmed plan will be significantly and adversely affected, which in turn adversely affects this Estate and, ultimately, all parties in interest. By comparison, the Litigation Injunction will have relatively few adverse effects inasmuch as Armstrong is the only party (other than the vote of English & Gloven) objecting to its issuance. The harm to Armstrong will be that he will be unable to satisfy his bent for uncontrolled litigation. However, that consideration has no merit in this context. Should any issue arise regarding the scope of the Litigation Injunction, Armstrong must apply to this Court for authority to commence or continue any litigation against these parties. Therefore, his rights are protected.

The issuance of the Litigation Injunction advances the public interest. By protecting the value of the Estate through the efficient and focused liquidation of its assets, the Litigation Injunction will conserve the liquidated

assets for the benefit of creditors as well as, potentially, Armstrong. To squander those assets in tireless litigation only serves to deplete the money available to creditors and Armstrong. In addition, the public interest is best served by preventing the inefficient use of judicial resources in the adjudication of whatever matters the enjoined parties may conceive. Voluminous pleadings and countless, unfruitful hearings only serve to clutter a court's docket and to deprive other parties of a court's attention. Moreover, the Litigation Injunction is in Armstrong's best interest. As a Class 5 creditor, he will receive any remaining residual benefit from the efficient liquidation of Estate assets rather than forcing the Trustee to divert those assets toward paying legal fees incurred in litigating matters. Further, the litigation injunction allows Armstrong to pursue his "fresh start" as contemplated by the Bankruptcy Code.

Finally, it is without question that this court has the authority to enjoin actions which threaten the integrity of the Estate. *In re Energy Co-op,* 886 F.2d 921 (7th Cir. 1989). Absent the injunction, the parties sought to be enjoined will continue the practice of bringing and defending against unyielding litigation. Armstrong has made unequivocal his intentions to collaterally attack the Texas Modified Judgment and any ruling of this or any other court that he feels affects him adversely. Similarly, Steppes has demonstrated that as long as Armstrong files various causes of action, it will defend against those actions whatever the cost. As a result, this Estate will undoubtedly have to participate in order to defend its interest against these recurring abuses and will, along with the other parties, incur substantial expense in litigating those matters, In addition, this Court's Case

Management Order dated November 7, 2000 orders all parties in this bankruptcy case not to interfere with the administration of the estate or its assets and to seek a Court ruling if they are unclear on what those boundaries are. Nevertheless, Armstrong has repeatedly violated that Case Management Order by filing duplicative complaints in various jurisdictions, attempting to assert control over interests of this Estate, and interfering with the administration of the estate. Nothing short of the Litigation Injunction will protect the estate. There is a cognizable danger of recurrent violations, and no representation that Armstrong may make that he will not continue to interfere with the administration of the Estate is reliable.

V. *Surrender Motion.* In connection with Surrender Motion, the Debtor has at all relevant times been the trustee of the Charitable Remainder Unitrust (organizational documents and amendments included as exhibit no. 213) and the Armstrong Family Trust (organizational documents and amendments included as exhibit no. 214). The rights of the Debtor as settlor and income beneficiary under the Armstrong Family Trust became property of this Estate. The rights of the Debtor as donor and recipient under the Charitable Remainder Unitrust also became property of this Estate. Also, two judgments (exhibits no. 203 and 204 at the confirmation hearing, hereinafter the "State Court Judgments") transferred the rights to all of the property of the Charitable Remainder Unitrust and the Armstrong Family Trust to the Debtor prior to the Debtor's bankruptcy filing. Thus, all of the property of the Trusts became property of this Estate. The property included, but is not limited to, any and all rights to pursue, prosecute, settle or otherwise exercise control or dominion over the so-called "Texas Litigation," litigation

beginning in Tarrant County Texas, Case No. 67-156473-94 and subsequently appealed and determined by an order entered by the Texas Court of Appeals [exhibit no. 1]. All petitions for of review to the Texas Supreme Court with respect to the Texas Litigation have been denied. The guarantee of John L. Feece [exhibit no.CC] and all rights thereunder in favor of the Trusts also became property of Debtor's Estate pursuant to the State Court Judgments. The evidence has also proven that all of the following causes of action are property of the Estate and have been wrongfully and contemptuously maintained by the Debtor and/or the Trusts: (1) litigation initiated by complaint [exhibit no. 50] and pending in Utah State District Court, Case No. 010600131; (2) litigation initiated by complaint [exhibit no. 53] and pending in United States District Court, Northern Division of Texas, Dallas Division, Case No. 3-01CV1722-L; (3) litigation initiated by complaint [exhibit no. 55] and pending in United States Bankruptcy Court, District of Utah, Adv. Proc. No. 01-2226; (4) litigation initiated by complaint [exhibit no. 57] and pending in the United States District Court, District of Utah, Civ. Case No. 01-CV-843. It is therefore determined that the Trustee has the authority to control the litigation described herein and similar litigation not described herein which has been or may be initiated by the Debtor.

The Debtor, as trustee of the Trusts, stipulated and caused such State Court Judgments to be entered in favor of himself. The State Court Judgments are final, valid, nonappealable orders of the Utah State Court and are binding upon the Debtor and the Trusts. The State Court Judgments do not constitute "contracts" of any type between the Debtor and the Trusts. The Debtor as trustee of the Trusts is responsible for complying with the State

Court Judgments and any court of competent jurisdiction, including this Court, may order the Debtor to comply with the State Court Judgments. The Debtor also effected the dissolution of the Armstrong Family Trust prior to this filing as evidenced by amendment 13 in exhibit no. 214.

It having been determined, after hearing on notice, that the Plan satisfies the requirements for confirmation set forth in 11 U.S.C. § 1129(a) and (b), and that good cause appears to grant the related motions as set forth below, and based on findings of fact and conclusions of law announced on the record and the foregoing findings of fact and conclusions of law, IT IS ORDERED that:

1. *Confirmation of the Plan.* The Plan is confirmed. A copy of the confirmed Plan is attached to this order as exhibit no. A.[4]

2. *Voting Rights.* The Trustee's Voting Rights Motion is granted. The Trustee owns and was authorized to vote 70% of each of the claims of Enis & Gilchrist, Linda Jenkins, and Robert Smith and the Debtor was authorized to vote 30% of such claims.

3. *Steppes Settlement.* The Steppes Settlement Agreement is approved and the Steppes Settlement Motion is granted.

4. *Surrender of Assets.* The Surrender Motion is granted. The Debtor is ordered to surrender to the Trustee and to cease exercising dominion or control over any of the following:

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[4] It appears that some of the pages of the docketed Plan are duplicates.

a. All causes of action, claims, assets, and personal property that is not exempt in the possession of and belonging to Donald E. Armstrong as of March 10, 2000, the date of filing. Such interests include the rights as settlor and beneficiary under the Armstrong Family Trust and the rights as recipient and donor under the Charitable Remainder Unitrust.

b. All causes of action, claims, assets, and personal property in the possession of and belonging to the Trusts as of November 26, 1999, and thereafter, including any rights that the Trusts may have had in the litigation referred to as the Texas Litigation, originally filed in Tarrant County, Texas, Case No. 67-156473-94, and any rights to appeal therefrom, including all petitions, writs and motions which may be brought in any court including the United States Supreme Court.

c. Donald E. Armstrong, as trustee of the Trusts and as Debtor in this case, is ordered to surrender any rights he or the Trusts purports to assert to the Texas Litigation (and all causes of action asserted therein) and all other litigation involving the Trusts or derived from rights belonging to the Trusts, including the following cases, claims and causes of action: (1) litigation initiated by complaint [exhibit no. 50] and pending in Utah State District Court, Case No. 010600131; (2) litigation initiated by complaint [exhibit no. 53] and pending in United States District Court, Northern Division of Texas, Dallas Division, Case No. 3-01CV1722-L; (3) litigation initiated by complaint [exhibit no. 55] and pending in United States Bankruptcy Court, District of Utah, Adv. Proc. No. 01-2226; (4) litigation initiated by complaint [exhibit no.57] and pending in United States District Court, District of Utah, Civ. Case No. 01-CV-843. The Debtor is ordered and

required to surrender the foregoing causes of action, suits, choses in action and claims by obtaining the dismissal of each of the specific causes of action set forth above. With respect to any other cause of action maintained by the Trusts or otherwise belonging to the Estate, the Debtor is instructed to seek direction from the Trustee with respect to the surrender of such cause of action. To the extent the Debtor fails, within 15 days after the entry of this Order, to effectuate the dismissal of the litigation identified in this paragraph, the Trustee shall have the right to effectuate the dismissal of such litigation by presenting this Order in the case on behalf of the Debtor and effecting a dismissal with prejudice.

d. Donald E. Armstrong, as trustee of the Trusts and as Debtor in this case, is ordered to surrender all assets of the Trusts, including (1) the guarantee of John L. Feece [exhibit no. CC] executed in favor of the Trusts dated September 29, 1994; (2) the notes and trust deeds executed by Steppes in favor of the Trusts including the Note dated September 29, 1994, in the original principal amount of $375,250, and recorded on September 29, 1994 as Instrument No. D194217212 executed by Steppes and the Armstrong Family Trust and the Trust Deed associated therewith recorded as Instrument No. D194217212, the note dated September 29, 1994 in the original principal amount of $1,071,500 executed by Steppes, together with the Trust Deed associated therewith and recorded as Instrument D194217210, and other associated documents including the "Assignment of Rents and Leases and UCC-1 Fixture Filing" which were closing documents issued from Escrow No. GF#AH-94CO7667-RCS associated with the aforementioned notes and trust deeds; (3) all other personal property of the Trusts. These items of property shall

be considered immediately surrendered by the Debtor and transferred to the Estate, to the extent necessary, by virtue of the execution of this order without the need of any further documentation. This order shall be proof of the Trustee's ownership of such property and the Trustee may use this document to establish the Estate's interest in such property.

e. The Estate's interest as settlor shall be exercised by the Trustee to the extent necessary to complete the revocation and dissolution of the Armstrong Family Trust. Armstrong shall have no right to participate in the dissolution of the Armstrong Family Trust or to assert any interest associated with the Armstrong Family Trust.

f. The Debtor, as Trustee of the Charitable Remainder Unitrust, is ordered to comply with the State Court Judgments and surrender any and all property, claims, assets, and causes of action to this Estate until such time as he is removed as Trustee of the Charitable Remainder Unitrust by this Estate acting as Donor of the Charitable Remainder Unitrust.

g. The litigation rights belonging to this Estate derived from the Trusts which afford this Estate rights against Steppes, including the Texas Litigation, are valued for the purpose of this ruling only at $1,398,979 and shall be deemed to satisfy the State Court Judgments in that amount.

5. *Objections Overruled.* The Debtor's Objection and all other objections, if any, to the Plan, and all objections to the Trustee's Voting Rights Motion, the Steppes Settlement Motion, and the Surrender Motion are overruled.

6. *Implementation of the Plan.* The Trustee is hereby authorized to take all steps and execute any and all documents necessary or appropriate to implement the Plan, the Steppes Settlement, and the Debtor's surrender of assets.

7. *Discharge of the Debtor.* Except as otherwise provided in the Plan and in the Bankruptcy Code, effective on the Effective Date, to the extent permissible under Section 1141 of the Bankruptcy Code, the Debtor is discharged of all prepetition debts of, claims against, liens on, and interests in the Debtor, his assets, or properties, which debts, claims, liens, and interests arose at any time before the entry of the filing of this Case. Because the Debtor is an individual debtor, confirmation of the Plan does not discharge him from any debt excepted from discharge under Section 523 of the Bankruptcy Code.

8. *Releases.*

A. *Steppes Release.* The release by the Trustee and the Estate of any and all claims arising from events that occured before Confirmation, including claims of any nature whatsoever that the Trustee or the Estate hold for monetary damages or otherwise, whether known or unknown, liquidated or unliquidated, against Steppes (as defined in the Plan), the Steppes Parties (as defined in the Plan), and Steppes employees, principals, professionals, agents, successors-in-interest, and assigns, is approved.

B. *Release of the Estate.* Except as otherwise expressly provided in the Plan, on the Effective Date, all Persons who have held, hold, or may hold claims, in consideration for the obligations of the Estate under the Plan, will be deemed to have forever waived, released, and discharged all rights or claims, whether based upon tort,

fraud, contract, or otherwise, which they heretofore, now, or hereafter possess or may possess against the Estate existing prior to the Effective Date, except as set forth in the Plan.

9. *Injunctions.*

A. *Section 1141 Injunction.* In accordance with Section 524 of the Bankruptcy Code, the discharge provided by this section and Section 1141 of the Bankruptcy Code, *inter alia*, shall act as an injunction against the commencement or continuation of any action, employment of process, or act to collect, offset, or recover the claims discharged hereby.

B. *Litigation Injunction.* Donald E. Armstrong, the Donald E. Armstrong Family Trust, the Donald E. Armstrong Charitable Remainder Unitrust, and any other entity related to the Debtor and controlled by him in whole or in part, now and in the future, and any other entity over which the Debtor asserts actual control in whole or in part, now and in the future, their agents, attorneys and those acting in concert with them, are hereby permanently enjoined from commencing or continuing any litigation against Steppes Apartments, Ltd., John Feece, Rosalie Feece, Baxter Holdings, Inc., Jeffrey L. Shields, Zachary T. Shields, Callister Nebeker & McCullough, Robert Bodoin, Hill Gilstrap, Frank Hill, Frank Gilstrap, Sal Espino, Chris Harris, Ben Levinson, Victor Vilaplana, Dennis Wickham, Elizabeth Smith, and Seltzer Caplin McMahon Vitek, and any and all other attorneys of Steppes and their law firms and all employees of such firms, Roger G. Segal as trustee in *In re Mountain Pacific Ventures, Inc.*, Bankr. Case No. 99-22588, Kenneth A. Rushton, the Trustee in this case, and these parties' principals, professionals,

agents, and assigns based upon (1) claims or causes of action released pursuant to the terms of this Plan and the Steppes Settlement Agreement, and (2) claims or causes of action based upon action taken by the Trustee, Segal, the Steppes Parties (all as defined in the Plan) and any of those parties' principals, professionals, agents, and assigns in effectuating the Steppes Settlement Agreement and this Plan. *See also* Fed. R. Bankr. P. 3016(c)(2002).

Armstrong must apply to the Court for authority to commence litigation against any of these parties or their principals, professionals, agents, or assigns, must show that the proposed litigation does not violate the terms of this Plan, and must provide reasonable notice and opportunity to respond to the party against whom Armstrong wishes to proceed. The Court will grant such authority only upon a finding that such litigation does not violate the terms of this Plan, including the Litigation Injunction and the Releases described in Sections 12.1.1.1 and 12.1.1.2 of the Plan. If Armstrong applies to the Court to pursue such litigation and his application is denied, then the party or parties responding to the application shall be awarded reimbursement of attorneys' fees and costs reasonably incurred in connection with the application, with such reimbursement to be paid from the Reorganization Trust.

10. *Retention of Jurisdiction*. The Court shall retain exclusive jurisdiction of this case for the purposes set forth in the Plan, including without limitation, to adjudicate all controversies concerning the classification or allowance of claims, to make such Orders as are necessary or appropriate to aid the consummation of the Plan and to ensure the implementation of the provisions of the Plan and this

Order in the manner provided under Section 1142 of the Code and Fed. R. Bankr. P. 3020(d).

11. *Plan and Order Binding.* The provisions of the Plan and this Order are hereby made binding upon the Trustee, the Debtor, and any and all holders of claims against or interest in the Debtor, whether or not such claim or interest is impaired under the Plan, and whether or not such holder of a claim has accepted or rejected the Plan.

12. *No Release of Regulatory Obligations.* Nothing in this Confirmation Order or the Plan releases any entity from any liability to the United States or the State of Utah under any police or regulatory statute enforceable by the United States or the State of Utah, as the owner or operator of property after the Effective Date, nor shall anything in the Confirmation Order or Plan discharge any claim of the United States or the State of Utah under environmental statutes that arises after confirmation of the Plan.

13. *Trustee to Give Notice of Entry of Confirmation Order.* Trustee shall give to all creditors and parties in interest notice by mail of the entry of this Order in accordance with Fed. R. Bankr. P. 2002(f)(7) and shall file a certificate evidencing such service.

Dated: January 31, 2002

BY THE COURT:

Judith A. Boulden
Honorable Judith A. Boulden
United States Bankruptcy
Judge

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing ***FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DATED JANUARY 31, 2002, CONFIRMING AND APPROVING TRUSTEE'S SECOND REVISED PLAN OF REORGANIZATION DATED NOVEMBER 19, 2001 [Docket No. 5731 AND GRANTING RELATED MOTIONS [Docket Nos. 612, 613, and 69.5]*** upon the following at the address set forth below, postage prepaid, by depositing the same in the United States Mail on the 31st day of January, 2002.

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Donald Erwin Armstrong
P. O. Box 1059
Park City, UT 84060

[Illegible]
Law Clerk

APPENDIX 3

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

IN RE:	)	
MOUNTAIN PACIFIC VENTURES, INC.	)	Case No. 99-22588 Chapter 11
Debtor.	)	

ORDER

On the 9th day of July, 2002, the Motion for Relief from Stay to Pursue Collection of the Transwest Credit Union Note and the 1993 Suzuki filed by the Debtor; Trustee's Response; Motion to Compel Roger G. Segal to Comply with the Court's March 11, 2002 Ruling Relation to the Transwest Credit Union Claim filed by the Debtor; and Response by Roger G. Segal, Trustee, came on for hearing. Counsel appearing were Julie Bryan for Roger Segal; Kenneth Cannon and Penrod Keith for Kenneth Rushton, Chapter 11 Trustee of the Estate of Donald E. Armstrong; Jeffrey Shields for Steppes Apartments; and Donald Armstrong, pro se. After hearing evidence presented, the Court does hereby enter the following findings and conclusions in conformity with Rule 7052, Fed. R. Bankr. P., in this core proceeding.

Armstrong seeks relief from the stay to pursue collection of the Transwest Credit Union Note and also seeks to compel the Chapter 11 Trustee, Roger Segal, to comply with the Judge Boulden's ruling on March 11, 2002. Armstrong borrowed money from Transwest Credit Union in his personal capacity. However, the title to the 1993

Suzuki was held in the name of Mountain Pacific Ventures ("MPV"). This vehicle has always been used by Armstrong. At the hearing, Armstrong testified that the vehicle has 108,000 miles on it. Further, only he has driven it during the course of MPV's bankruptcy without payment to MPV for the use of the vehicle. The vehicle is valued at approximately $1,500. At some point, Armstrong purchased the note from Transwest. Armstrong alleges that the claim is approximately $7,300. A Minute Entry was entered on March 11, 2002, which provides:

> Minute Entry Re: Motion to Designate Donald Armstrong's Votes Under 11 U.S.C. 1126(e)(2) Objection to the claim of Transwest Credit Union. Confirmation of the plan is confirmed. The trustee will resolve the claim of Transwest as proposed by the court. Motion granted to designate votes. Appearances: Julie Bryan, Kenneth Cannon, Don Armstrong, Jeffrey L. Shields, Peter Kuhn; (related document(s) *303, 293, 305*). (th,) (EOD: 3/11/2002)

On May 3, 2002, an Order was entered confirming the Plan, which provides, in pertinent part, as follows:

> D. *Armstrong's Objection*. The Armstrong Objection has been considered by the Court. The Court finds that it is reasonable and proper to amend the Plan to provide that the collateral securing Transwest Credit Union's claim (a 1993 Suzuki Sidekick) shall either be retained, in full satisfaction of the claim of Transwest Credit Union or surrendered to the Trustee within 60 days of the entry of this Order. In the event the collateral is turned over to the Trustee, the Trustee shall sell the collateral and turn the proceeds over to holder of the claim of Transwest Credit Union. In the event a deficiency

> exists in the amount necessary to satisfy the obligation owed, Transwest Credit Union, Transwest Credit Union or its assignee may file a proof of claim asserting an unsecured claim in the amount of the deficiency. The Trustee shall have 30 days thereafter to object to the claim. Any allowed unsecured claim shall be paid on par with other allowed unsecured claims under class 3 of the Plan. With said modification of the Plan, the Court finds the claim of Transwest Credit Union is unimpaired. Any and all objections raised by Armstrong to confirmation of the Plan are overruled.

Mr. Armstrong submitted into evidence a transcript of the March 11, 2002 hearing and the Court finds that the Order Confirming Plan is consistent with the hearing on March 11, 2002.

Section 362(d) allows relief from the stay for cause. A confirmed plan binds the debtor, creditor and any entity acquiring property under the plan. 11 U.S.C. §1141(a). Clearly, the Order provides that Armstrong can either retain the vehicle in full satisfaction of the debt or sell the vehicle and file a claim for the deficiency. The sale of the vehicle was to take place within sixty (60) days from the date of the Order. That time has now expired. Thus, counsel for Segal stated that the title would be turned over and the Trustee would abandon the 1993 Suzuki to Armstrong in full satisfaction of the debt. Thus, Armstrong does not need relief from the stay to collect on the note. It has been satisfied by the abandonment of the vehicle which is consistent with the Order Confirming Plan. The Motion to Compel will be granted to the extent the Trustee is required to turnover title to the vehicle to the Suzuki.

IT IS THEREFORE ORDERED that the Motion for Relief from Stay to Pursue Collection of the Transwest Credit Union Note and 1993 Suzuki filed by the Debtor is **denied**.

IT IS FURTHER ORDERED that the Motion to Compel Roger G. Segal to Comply with the Court's March 11, 2002 Ruling Relating to the Transwest Credit Union Note Claim is **granted in part and denied in part**.

DATED this ___ day of July, 2002.

/s/ Tom R. Cornish
TOM R. CORNISH
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Order, postage prepaid, this ___ day of July, 2002, to the following:

Donald E. Armstrong
P.O. Box 1059
Park City, UT 84060

Julie A. Bryan
Cohne, Rappaport & Segal
525 East 100 South, 5th Floor
P.O. Box 11008
Salt Lake City, UT 84147-0008

/s/ Tina Coates
Tina Coates

APPENDIX 4

Penrod W. Keith (Utah Bar No.4860)
Mark W. Dykes (Utah Bar No. 5067)
LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.
136 South Main Street, Suite 1000
Salt Lake City, Utah 84103
Telephone: (801) 320-6700
Facsimile: (801) 359-8256

Counsel for proposed intervener,
Kenneth A. Rushton

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

In re: MOUNTAIN PACIFIC VENTURES, INC., Debtor.	Bankruptcy No. 99C-22588 Chapter 11
ROGER G. SEGAL, Chapter 11 Trustee of the bankruptcy estate of MOUNTAIN PACIFIC VENTURES, INC., Plaintiff, vs. STEPPES APARTMENTS, LTD., and Does 1 through 6 inclusive Defendants.	Adversary Proceeding No. 99P-2218

ORDER APPROVING STIPULATED MOTION OF KENNETH A. RUSHTON, CHAPTER 11 TRUSTEE FOR THE ESTATE OF DONALD E. ARMSTRONG, TO DISMISS THIS LITIGATION

(Filed Jul. 18, 2002)

Based on the Stipulated Motion of Kenneth A. Rushton, Chapter 11 Trustee for the Estate of Donald E. Armstrong, to Dismiss this Litigation the court hereby ORDERS that this adversary proceeding be dismissed with prejudice.

DATED this 29th day of July, 2002.

BY THE COURT

/s/ Tom Cornish
The Honorable Tom R. Cornish
United State Bankruptcy Court
Judge

APPROVED AS TO FORM:

LeBOEUF, LAMB, GREENE & MacRAE, LLP

By: /s/ Penrod W. Keith
Penrod W. Keith, Counsel for
Kenneth A. Rushton, Chapter 11
Trustee for the Estate of Donald E. Armstrong

CALLISTER, NEBEKER & McCULLOUGH

By: /s/ Zachary T. Shields
Zachary T. Shields,
Counsel for Defendants,
Steppes Apartments Ltd.

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was served on the 9 day of August ~~July~~, 2002, via first class mail, postage prepaid, on the following:

Penrod W. Keith
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Kenneth A. Rushton
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P.O. Box 202
Lehi, UT 84043

Donald E. Armstrong
P.O. Box 1059
Park City, UT 84060

Jeffrey L. Shields
Zachary T. Shields
Callister, Nebeker & McCullough
10 East South Temple, #900
Salt Lake City, UT 84133

Julie A. Bryan
Cohne, Rappaport & Segal
525 East 100 South, Suite 500
Salt Lake City, UT 84102

BY THE COURT

/s/ [Illegible]
Deputy Clerk

APPENDIX 5

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

IN RE:	)	
MOUNTAIN PACIFIC VENTURES, INC.	)	Case No. 99-22588 Chapter 11
Debtor,.	)	
DONALD E. ARMSTRONG	)	Adv. No. 01-2383
Plaintiff,	)	
vs.	)	
ROGER G. SEGAL, et al.	)	
Defendants.	)	

ORDER

On the 20th day of March, 2003, the Amended Motion to Dismiss filed by Roger Segal, Julie Bryan and Cohne, Rappaport & Segal, Joinder in Motion to Dismiss filed by MG Properties and Mark Gleiberman, Joinder by James Marinos, Joinder by Thomas L. and Wilma J. Black, Thomas D. Paxton, M. E. Porcupile, Bert Yager, Mario Cioe and Rose Cioe, Carolee Gillam and Descanso Associates; Objection filed by Donald E. Armstrong; Reply by Roger Segal, Julia A. Bryan and Cohne, Rappaport & Segal; and Reply filed by MG Properties and Mark Gleiberman came on for hearing. Counsel appearing were Julie A. Bryan and Roger Segal for Roger Segal, Julie A. Bryan and Cohne, Rappaport & Segal; Gerald Suniville for MG Properties and Mark Gleiberman; and Donald E. Armstrong, pro se. After hearing arguments presented,

this Court does hereby enter the following findings and conclusions in conformity with Rule 7052, Fed. R. Bankr. P.

The parties seek dismissal of this adversary proceeding for failure to state a claim. The Plaintiff filed an Amended Complaint (1) for a declaratory ruling regarding a commission on the sale of the Descanso property; (2) that Roger Segal, Julie Bryan and Cohne, Rappaport & Segal breached their fiduciary duty to Mountain Pacific Ventures and its creditors; (3) for conspiracy and (4) for fraud and conspiracy regarding a post-petition commission on the sale of the Broadway Apartments. After this adversary proceeding was commenced, the Defendants filed a Motion to Dismiss and/or Joinders in the Motion to Dismiss. Armstrong filed an Application to Withdraw the Reference. The District Court denied the Motion to Withdraw the Reference on December 18, 2002.

First, Armstrong seeks to require Descanso to pay the estate of Mountain Pacific Ventures funds owed to it. Further, Armstrong alleges that Descanso owes a commission. Dismissal for lack of standing falls within Fed. R. Civ. P. 12(b)(6). *In re Stoll*, 252 B.R. 492 (9th Cir. BAP 2000) (citations omitted). "To have standing, a party must assert its own legal rights and interests and cannot rest its claim to relief on the legal rights or interests of third parties." *In re Cogar*, 210 B.R. 803, 808 n. 7 (9th Cir. BAP 1997). The *Stoll* Court noted:

> While a *third* party hired by a bankruptcy trustee may owe a fiduciary duty to the estate, *see, e.g., In re Taxman Clothing Co.*, 49 F.3d 310, 314 (7th Cir. 1995), it does not necessarily follow that the Debtor and individual creditors have standing to pursue redress for a violation of that duty.

> A trustee is the legal representative of the bankruptcy estate and as such has the capacity to sue and be sued. § 323. *See also In re Joseph*, 208 B.R 55, 60 (9th Cir. BAP 1997). Only a trustee may pursue a cause of action belonging to the bankruptcy estate. *Griffin v. Allstate Ins. Co.*, 920 F. Supp. 127, 130 (C.D. Cal. 1996); *Bostanian v. Liberty Savings Bank*, 52 Cal.App.4th 1075, 61 Cal. Rptr.2d 68, 72 (1997).

Stoll, 252 B.R. at 495.

Whether a claim is property of the estate or belongs to an individual creditor depends on whether the claim is a general or particular claim. *In re Morpheus Lights, Inc.*, 228 B.R. 449, 453 (Bankr. N.D. Cal. 1998). "If a claim is a general one, with no particularized injury arising from it, and the claim can be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action." *St. Paul Fire & Marine Insurance Co. v. PepsiCo, Inc.*, 884 F.2d 688, 700-01 (2nd Cir. 1989) (citations omitted).

In this case, Armstrong is a creditor of Mountain Pacific Ventures. The action is a general claim that belongs to the Trustee. If there is some compromise between the Trustee and Descanso, an appropriate Motion to Compromise will be required and Armstrong will be given the opportunity to object. However, in this case, the Mountain Pacific Ventures' Plan has been substantially consummated and the right to payment from Descanso has passed to Kenneth A. Rushton, Chapter 11 Trustee of the Estate of Donald E. Armstrong. Donald E. Armstrong was the sole shareholder of Mountain Pacific Ventures when

Donald E. Armstrong filed an individual Chapter 11 in March, 2000.

Armstrong's claim against Descanso for a commission bears no relation to this bankruptcy. If Armstrong is entitled to post-petition commission pursuant to some agreement, this is not the appropriate forum to bring such action.

Next, Armstrong seeks to bring an action for breach of fiduciary duty against Roger Segal, Julie Bryan and Cohne, Rappaport & Segal Armstrong brought this adversary proceeding during the pendency of the bankruptcy. Section 362(a)(3) provides that the filing of a petition operates as a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. §362(a)(3). Since the filing of this adversary proceeding, the Mountain Pacific Ventures' Plan was confirmed. The confirmation order in that case contained a litigation injunction which provides:

> B. *Litigation Injunction.* Armstrong, the Donald E. Armstrong Family Trust, the Donald E. Armstrong Charitable Remainder Unitrust, and any other entity related to Armstrong and controlled by him in whole or in part, now or in the future, and any other entity over which Armstrong asserts actual control in whole or in part, now and in the future, their agents, attorneys and those acting in concert with them, are hereby permanently enjoined from commencing or continuing any litigation against Steepes [sic] Apartments, Ltd. ("Steppes"), John Feece, Rosalie Feece, Baxter Holdings, Inc., Jeffrey L. Shields, Zachary T. Shields, Callister Nebeker & McCullough, Robert Bodoin, Hill Gilstrap, Frank

Hill, Frank Gilstrap, Sal Espino, Chris Harris, Ben Levinson, Victor Vilaplana, Dennis Wickham, Elizabeth Smith, and Seltzer Caplin McMahon Vitek, and any and all other attorneys of Steppes and their law firms and all employees of such firms, Roger G. Segal as trustee in *In re Mountain Pacific Ventures, Inc.*, Bankr. Case No. 99-22588, Kenneth A. Rushton, ("Rushton") Trustee in *In re Donald E. Armstrong,* Bankr. Case No. 00-26592, and those parties' principals, professionals, agents, and assigns based upon (1) claims or causes of action released pursuant to the terms of the Plan and the Settlement Agreement, and (2) claims or causes of action based upon action taken by the Trustees, the Steppes Parties (all as defined in the Settlement Agreement) and any of those parties' principals, professionals, agents, and assigns in effectuating the Settlement Agreement and the Plan. *See also* Fed. R. Bankr. P. 3016(c)(2002).

Armstrong must apply to this Court for authority to commence litigation against any of these parties or their principals, professionals, agents, or assigns, must show the proposed litigation does not violate the terms of this Plan, and must provide reasonable notice and opportunity to respond to the party against whom Armstrong wishes to proceed. The Court will grant such authority only upon a finding that such litigation does not violate the terms of this Plan, and this Litigation Injunction. If Armstrong applies to the Court to pursue such litigation and his application is denied, then the party or parties responding to the application shall be awarded reimbursement of attorneys' fees and costs reasonably incurred in connection with the application, which the Court, in its discretion,

> may assess against Armstrong and/or which may be paid from funds remaining in the estate or from the Armstrong Estate under Paragraph 1.9 of the Settlement Agreement.

Armstrong did not obtain relief from the automatic stay nor has he obtained Court approval after the litigation injunction was entered.

Further, the Amended Complaint fails to state a claim for breach of fiduciary duty. An allegation that a trustee has shown poor judgment does not provide a basis for breach of fiduciary duty. *In re Kidscreek Partners, L.P.*, 248 B.R. 554, 561 (Bankr. N.D. Ill. 2000).

The Amended Complaint also fails to state a claim for conspiracy. A civil claim for conspiracy requires: (1) a combination of two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result thereof. *Tremelling v. Ogio International, Inc.*, 919 F.Supp. 392, 395-96 (D. Utah 1996) (citing *Israel Pagan Estate v. Cannon*, 746 P.2d 785 (Utah Ct. App. 1987). The *Israel Pagan Estate court* noted:

> To assert civil conspiracy, plaintiff must also prove that the alleged conspirators performed one or more unlawful, overt acts. If the object of the alleged conspiracy or the means used to attain it is lawful, even if damage results to plaintiff or defendant acted with a malicious motive, there can be no civil action for conspiracy. 'If such were not the rule, obviously many purely business dealings would give rise to an action in tort on behalf of one who may have been adversely affected.' *Duffy*, 541 P.2d at 1202

Israel Pagan Estate, 746 P.2d at 792. This dispute centers around business judgment. The "object" of this alleged conspiracy is lawful and there can be no civil action for conspiracy. Thus, the claim must fail.

Lastly, the issue regarding the Broadway Apartments commission has been resolved in the case of *Donald E. Armstrong*, Bankr. Case No. 00-26592. In the Donald E. Armstrong case, on May 15, 2001, an order was entered approving the sale of an apartment complex located in Escondido, California. This adversary is merely a collateral attack on that order. Armstrong appeared at the hearing on that motion. As a result, the Court finds that this cause of action must fail.

IT IS THEREFORE ORDERED that the Amended Motion to Dismiss filed by Roger Segal, Julie Bryan and Cohne, Rappaport & Segal and Joinder in Motion to Dismiss filed by MG Properties and Mark Gleiberman, Joinder by James Marinos, Joinder by Thomas L. and Wilma J. Black; Thomas D. Paxton, M. E. Porcupile, Bert Yager, Mario Cioe and Rose Cioe, Carolee Gillam and Descanso Associates is **granted**.

DATED this 9th day of April, 2003.

/s/ Tom Cornish
TOM R. CORNISH
United States
Bankruptcy Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Order, postage prepaid, this 11th day of April, 2003, to the following:

Donald E. Armstrong
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EOD: 4/11/03